No. 3002

United States

Circuit Court of Appeals

For the Ninth Circuit.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Plaintiff in Error,

vs.

LOUIS ANDERSON,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

SYMS-YORK CO PRINTERS & BINDERS, BOISE 44533

*No.*_____

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INDEX

Names and Addresses of Attorneys of Record

MESSRS. FEATHERSTONE & FOX,
Wallace, Idaho,
Attorneys for Plaintiff in Error.

MESSRS. McFARLAND & McFARLAND,
Coeur d'Alene, Idaho,
Attorneys for Defendant in Error.

In the District Court of the United States for the District of Idaho, Northern Division.

LOUIS ANDERSON,

Plaintiff,

vs.

FEDERAL MINING AND SMELTING COMPANY, a Corporation,

Defendant.

No. 655.

COMPLAINT.

The above named plaintiff complains of the above named defendant, and for cause of action alleges:

I.

That at all of the times herein mentioned plaintiff was and yet is a resident of Shoshone County, State of Idaho; and defendant was and yet is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to transact and do business in the State of Idaho.

II.

That at all of said times defendant was the owner, in the possession of, and developing, operating and working that certain quartz mining lode or ledge situated near the Village of Mullan, in Shoshone County, State of Idaho, named, known as, and called the Morning Mine.

III.

That for a period of about one year next prior to and including the 8th day of May, A. D. 1916, plaintiff was in the employ of said defendant as machine man in said Morning Mine, and that it was his duty

among other things, by reason of said employment, to operate a certain machine commonly known as and called a compressed air drill or driller, which was then and there used by defendant in said Morning Mine for the purpose of drilling through rock and ledge matter of said mine.

IV.

That at all of the times herein mentioned, it was the duty of defendant to furnish and provide plaintiff a safe place to work in, at and upon, in said Morning Mine, but that disregarding its said duty in the premises and in this respect, it knowingly, carelessly and negligently permitted the place in said Morning Mine where plaintiff was performing his said duties, and hereinafter more particularly described, to become and remain in a dangerous and unsafe condition, in this, that it carelessly and negligently permitted the rock and ledge matter in and through which plaintiff was operating the drills of said compressed air drill or driller, and which was then and there situated above and over the head of plaintiff, to become loose and insecure.

V.

That on to-wit: the 8th day of May, A. D. 1916, and while plaintiff was engaged in the performance of his said duties on which is known as the 16-hundred foot level, on the west side of the eighth floor between what is known in said Morning Mine as the eleventh and twelfth ore chutes in the second cut, *and while he was operating said compressed air drill or diriller in drilling into and through said overhang-*

ing rock and ledge matter in said Morning Mine, without any fault or negligence on his part, a large quantity, to-wit, about nine tons of said loose and insecure rock and ledge matter gave way, broke loose and fell upon, covered up and remained upon plaintiff for the period of about twenty (20) minutes, whereby plaintiff was greatly hurt, bruised, wounded, lamed and crippled; that plaintiff by reason of the falling of said rock and ledge matter upon him was greatly injured in his head and on his right side, and his right foot was greatly crushed and the ligaments thereof torn and bruised, and the joint of his right foot was greatly bruised, sprained and wrenched, and that plaintiff's right arm and shoulder were greatly bruised, wrenched and crippled, and that his back was wrenched, twisted, strained, weakened and crippled.

VI.

That by reason of the aforesaid injuries sustained by plaintiff he has suffered and still suffers great physical and mental pain and anguish; that by reason of the injury to his head, his hearing has become impaired, and it is painful for him to eat or to open his mouth; that in consequence of the injuries to his right shoulder and arm, he has been rendered, and is unable to straighten out or otherwise use his said arm; that in consequence of the injuries received to his right foot, he has been and is unable to bear his weight upon said foot and is crippled and lamed therein; that by reason of the aforesaid injuries to his back, his back has become and is greatly weak-

ened and at all times pains him; that in consequence of all of said injuries, plaintiff is able to sleep but very little during the night and that his said injuries are so painful that by reason thereof he is kept awake during most of the night.

VII.

That at and prior to the time of receiving the injuries aforesaid, plaintiff did not know and had no means of knowing, and by the exercise of due care, caution and diligence could not have discovered the dangerous and unsafe condition of the place in, at and where he was performing his said duties, and did not know, and had no means of knowing, and by the exercise of due care, caution and diligence, could not have discovered that the said rock and ledge matter then and there being above and over him in the said Morning Mine where he was performing his said duties, were loose, insecure or otherwise dangerous or unsafe; that upon said day plaintiff commenced his work, which was at a period of time known as and called the night shift, about the hour of 6 o'clock of the night of said day, and that prior to commencing his said duties in the operation of said compressed air drill or driller, he carefully and cautiously examined and inspected the place in which he was performing his said duties and carefully inspected and examined the said overhanging rock but did not discover and could not discover that said rock and ledge matter was loosened or insecure or liable to fall upon him; that the unsafe and dangerous condition of said rock and ledge matter in the

place in said Morning Mine where plaintiff was then performing his said duties was not patent or obvious and that plaintiff sustained said injuries without any fault or negligence on his part; that the defendant at and prior to the time plaintiff received said injuries, knew of the unsafe and dangerous condition of said Morning Mine at the place where plaintiff was performing his said duties, and knew of the loose, insecure and unsafe and dangerous condition of the said overhanging rock and ledge matter which fell upon plaintiff as aforesaid, or could by the exercise of ordinary care or diligence have discovered said unsafe and dangerous condition of said rock and ledge matter and the place where plaintiff was performing his said duties in said Morning Mine, but knowingly, carelessly and negligently permitted plaintiff to enter upon and continue the performance of his said duties without apprizing, warning or notifying him of said dangers.

VIII.

That up to and at the time of sustaining the injuries aforesaid, plaintiff was a strong, healthy, able-bodied man of the age of only thirty-eight (38) years and was capable of earning and was earning Four and one-half ($4.50) Dollars per day; that the injuries sustained by plaintiff as aforesaid are permanent and lasting injuries and that plaintiff will continue to suffer great physical and mental pain in consequence thereof during the remainder of his life; that in consequence of said injuries plaintiff's earning capacity has been greatly diminished if not totally destroyed.

IX.

That by reason of the injuries sustained by plaintiff as aforesaid he has been and is damaged in the sum of Fifteen Thousand ($15,000) Dollars, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against said defendant for said sum of Fifteen Thousand ($15,000) Dollars, together with his costs and disbursements incurred in this action.

McFARLAND & McFARLAND,
Attorneys for Plaintiff,
P. O. Address, Coeur d'Alene, Idaho.

State of Idaho,
County of Shoshone,—ss.

Louis Anderson being first duly sworn, deposes and says: That he is the plaintiff named in the above and foregoing complaint; that he has read said complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters, he believes it to be true.

LOUIS ANDERSON,

Subscribed and sworn to before me this 10th day of June, 1916.

(Seal.) A. L. NICHOLSON,
Notary Public in and for the State of Idaho,
residing at Wallace, Idaho.

Filed June 12, 1916.
W. D. McReynolds, Clerk.
By L. M. Larson, Deputy.

(Title of Court and Cause.)

No. 655.

SUMMONS.

THE PRESIDENT OF THE UNITED STATES

To Federal Mining and Smelting Company, a corporation, the above named defendant, GREETING:

You are hereby commanded to be and appear in the above entitled court, holden at Coeur d'Alene, Kootenai County, Idaho, in said district, and answer the complaint filed against you in the above entitled action within twenty (20) days from the date of service of this summons upon you, if served within the Northern Division of this district, or if served within any other division of said district, then within forty (40) days from the date of such service upon you, and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to-wit, for the sum of Fifteen Thousand dollars ($15,000) damages, sustained by plaintiff in the Morning Mine of defendant, near the village of Mullan, County of Shoshone, State of Idaho, on the 8th day of May, 1916, through the carelessness and negligence of defendant in failing to provide plaintiff, then in its employ, a safe place in which to work and labor in said Morning Mine, and by reason whereof large quantities of loose rock and ledge matter fell upon and crushed, injured, bruised and wounded plaintiff without any fault on his part and by reason of which said injuries, so sustained, plaintiff was damaged in said sum

of Fifteen Thousand dollars ($15,000), and for costs of this action.

The cause of action of plaintiff is more fully and completely stated in his verified complaint herein, a copy of which is hereto attached and made a part hereof.

And this is to COMMAND you, the Marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

WITNESS the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Coeur d'Alene, Idaho, in said district, this 12th day of June, 1916.

(Seal.) W. D. McREYNOLDS,

By Lawrence M. Larson, Deputy Clerk.

McFarland & McFarland,

Attorneys for Plaintiff,

P. O. Address, Coeur d'Alene, Idaho.

Filed June 29, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

STIPULATION FOR APPEARANCE, Etc.

It is hereby agreed and stipulated by and between the Plaintiff and the Defendant, in the above entitled action, as follows:

I.

That the defendant hereby acknowledges service of the Summons herein by receipt of a true and cor-

rect copy thereof attached to a true copy of the Complaint on file in said cause, and does hereby waive any and all other and further service of said Summons, and further, does hereby enter an appearance in this action.

II.

That the defendant have, and is hereby given and granted 30 days from the date hereof, in which to answer, plead or demur to the complaint of plaintiff, or to move against the same or to file any motion, plea or other objection thereto.

III.

That the defendant does not waive any rights hereby, except service of the Summons and Complaint by the United States Marshal or his deputy or such other persons authorized to make such service.

Dated this 27th day of June, A. D. 1916.

FEATHERSTONE & FOX,
Attorneys for Defendant.
McFARLAND & McFARLAND,
Attorneys for Plaintiff.

Filed June 29, 1916.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 655.
DEMURRER.

Comes now the defendant and demurs to the complaint of the plaintiff heretofore filed herein and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is indefinite and uncertain in this, that said complaint fails to show how or in what manner the defendant was careless or negligent or how or in what manner this defendant allowed the rock and ledge matter in and through which plaintiff was operating drills, and which was situated above and over the head of the plaintiff to become loose and insecure.

III.

That said complaint fails to show how or in what manner the defendant failed to perform its duties in inspecting the said place or in notifying the said plaintiff of the fact that the said rock and ledge matter was loose, insecure, unsafe and dangerous.

IV.

Said complaint fails to show how or in what manner or by what means the said defendant knew or could have known or by a reasonable inspection could have discovered that the said rock and ledge matter at the place where plaintiff was performing his duties was loose, or unsafe or insecure or in a dangerous condition, or how or in what manner or by what means the said defendant could have ascertained said facts when the same could not be ascertained by the plaintiff after having made a careful inspection of the said back, from which the rock and ledge matter which are alleged to have fallen upon plaintiff came from.

WHEREFORE defendant prays judgment of this its demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,

Attorneys for Defendant, Federal Mining & Smelting Co. Residence and Postoffice address: Wallace, Idaho.

Service acknowledged.

Filed July 22, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

DECISON ON DEMURRER.

Aug. 23, 1916.

McFarland & McFarland, Attorneys for Plaintiff.

Featherstone & Fox, Attorneys for Defendant.

DIETRICH, DISTRICT JUDGE:

It may very well be true that general allegations to the effect that it was the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and that it knowingly suffered the place to become unsafe, in that it permitted rock overhanging the point where the plaintiff was drilling to become loose and insecure, as a consequence of which the plaintiff was injured, etc., would be sufficient to state a cause of action, but here the plaintiff has gone further, and by the alternative statement that defendant ought to have known of the perilous condition he has qualified the allegation that it actually did know. And then he has still further alleged facts from which it ap-

pears that he was an experienced miner, and that just before the accident he himself made a careful and cautious inspection of the rock, but "did not discover and could not discover that said rock and ledge matter was loosened or insecure or liable to fall upon him". But if the plaintiff could not upon "a careful and cautious" inspection discover the defective condition, in what respect was the defendant derelict in the performance of its duty? Possibly it was negligent, but in view of the present state of the pleading in the respects pointed out, the general charges cannot be held to be sufficient. The master does not insure or guarantee the safety of the place. He undertakes only to use reasonable care in providing and maintaining such a place. How was the defendant here negligent? What specifically was its duty in the premises, and in what particular did it fail to discharge this duty? If, as alleged, it ought to have known of the insecurity of the place, how could it discover the alleged defective condition?

The demurrer is sustained, with leave to plaintiff to amend within ten days.

Filed Aug. 23, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 655.

AMENDED COMPLAINT

Now comes the above named plaintiff and by this his amended complaint herein for cause of action against the above named defendant alleges:

I.

That at all of the times herein mentioned plaintiff was and yet is a resident of Shoshone County, State of Idaho; and defendant was and yet is a corporation organized and existing under and by virtue of the laws of the State of Deleware, and authorized to transact and do business in the State of Idaho.

II.

That at all of said times defendant was the owner, in the possession of, and developing, operating and working that certain quartz mining lode or ledge situated near the village of Mullan in Shoshone County, State of Idaho, named, known as, and called the Morning Mine.

III.

That for a period of about one year next prior to and including the 8th day of May, A. D. 1916, plaintiff was in the employ of said defendant as machine man in said Morning Mine, and that it was his duty, by reason of said employment, to operate a certain machine commonly known as and called a compressed air drill or driller, which was then and there used by defendant in said Morning Mine for the purpose of drilling through rock and ledge matter of said mine.

IV.

That at all of the times hereinmentioned, it was the duty of defendant to furnish and provide plaintiff a reasonably safe place to work in, at and upon, in said Morning Mine, but that, disregarding its said duty in the premises and in this respect, it care-

lessly and negligently suffered the place in said Morning Mine where plaintiff was performing his said duties, and hereinafter more particularly described, to become and remain in a dangerous and unsafe condition, in this, that it carelessly and negligently permitted the rock and ledge matter, in and through which plaintiff was operating the drills of said compressed air drill or driller, and which was then and there overhanging the place where plaintiff was performing said work, to become loose and insecure.

V.

That on, to-wit, the 8th day of May, A. D. 1916, and while plaintiff was engaged in the performance of his said duties on what is known as the 16-hundred foot level, on the west side of the eighth floor between what is known in said Morning Mine as the eleventh and twelfth ore chutes in the second cut, and while he was operating said compressed air drill or driller in drilling into and through said overhanging rock and ledge matter in said Morning Mine, without any fault or negligence on his part, a large quantity, to-wit, about nine tons of said loose and insecure rock and ledge matter gave way, broke loose and fell upon, covered up and remained upon plaintiff for the period of about twenty (20) minutes, whereby plaintiff was greatly hurt, bruised, wounded, lamed and crippled; that plaintiff by reason of the falling of said rock and ledge matter upon him was greatly injured in his head and on his right side, and his right foot was greatly crushed and the ligaments thereof torn and

bruised, and the joint of his right foot was greatly bruised, sprained and wrenched, and that plaintiff's right arm and shoulder were greatly bruised, wrenched, and crippled, and that his back was wrenched, twisted, strained, weakened and crippled.

VI.

That by reason of the aforesaid injuries sustained by plaintiff he has suffered and still suffers great physical and mental pain and anguish; that by reason of the injury to his head, his hearing has become impaired, and it is painful for him to eat or to open his mouth; that in consequence of the injuries to his right shoulder and arm, he has been rendered and is unable to straighten out or otherwise use his said arm; that in consequence of the injuries received to his right foot, he has been and is unable to bear his weight upon said foot and is crippled and lamed therein; that by reason of the aforesaid injuries to his back, his back has become and is greatly weakened and at all times pains him; that in consequence of all of said injuries, plaintiff is able to sleep but very little during the night and that his said injuries are so painful that by reason thereof he is kept awake during the most of the night.

VII.

That at and prior to the time of receiving the injuries aforesaid, plaintiff did not know and had no means of knowing and by the exercise of due care, caution and diligence could not have discovered the dangerous and unsafe condition of the place in, at and where he was performing his said duties, and

did not know, and had no means of knowing, and by the exercise of due care, caution and diligence, could not have discovered that the said rock and ledge matter then and there being above and over him in the said Morning Mine where he was performing his said duties, were loose, insecure or otherwise dangerous or unsafe; that upon said day plaintiff commenced his work, which was at a period of time known as and called the night shift, about the hour of six o'clock on the night of said day, and that prior to commencing his duties in the operation of said compressed air drill or driller, he examined and inspected the place in which he was performing his said duties, and examined the said overhanging rock and ledge matter with as much care and caution as he was able to exercise; that he was not provided with any means for testing the condition of said overhanging rock and ledge matter and had no instrument with which so to do; that he did not discover, and could not, by the exercise of reasonable care and caution, have discovered that said rock and ledge matter was loosened or insecure or liable to fall upon him; that, under the terms of plaintiff's employment, it was not his duty to test the condition of said overhanging rock and ledge matter, but that it was the duty of defendant to carefully examine and test the condition of said overhanging rock and ledge matter before plaintiff commenced the performance of his said duty in the operation of said drill or driller, which defendant negligently omitted to do; that plaintiff, prior to receiving said injuries and prior

to the time he commenced the performance of his said duties as aforesaid, had a right to believe and did believe that defendant had carefully inspected and tested the condition of said overhanging rock and ledge matter, and that the same was in a safe condition; that the defendant, at and prior to the time plaintiff received said injuries, could, by the exercise of ordinary care, caution or diligence, have discovered said unsafe and dangerous condition of said rock and ledge matter in the place where plaintiff was performing his said duties, but negligently and carelessly failed to do so, and carelessly and negligently permitted plaintiff to enter upon and continue the performance of his said duties without apprizing warning or notifying him of said dangers.

VIII.

That up to and at the time of sustaining the injuries aforesaid, plaintiff was a strong, healthy, able-bodied man of the age of only thirty-eight (38) years and was capable of earning and was earning four and one-half dollars ($4.50) per day; that the injuries sustained by plaintiff as aforesaid are permanent and lasting injuries and that plaintiff will continue to suffer great physical and mental pain in consequence thereof during the remainder of his life; that in consequence of said injuries plaintiff's earning capacity has been greatly diminished, if not totally destroyed.

IX.

That by reason of the injuries sustained by plaintiff as aforesaid he has been and is damaged in the

sum of Fifteen Thousand Dollars ($15,000), no part of which has been paid.

Wherefore plaintiff prays judgment against said defendant for said sum of Fifteen Thousand Dollars ($15,000), together with his costs and disbursements incurred in this action.

McFARLAND & McFARLAND,
Attorneys for Plaintiff,
P. O. Address: Coeur d'Alene, Idaho.

United States of America,
State of Idaho, County of Kootenai,—ss.

Louis Anderson, being first duly sworn, deposes and says: That he is the plaintiff named in the above and foregoing amended complaint; that he has read said amended complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters he believes it to be true.

LOUIS ANDERSON,

Subscribed and sworn to before me this 29th day of August, A. D. 1916.

JAS. H. FRAZIER,
(Seal.) *Notary Public in and for the State of Idaho.*

My commission expires 8-8-1918.

United States of America,
State of Idaho, County of Kootenai,—ss.

R. E. McFarland, being first duly sworn, deposes and says: That he is one of the attorneys of record of the plaintiff named in the above entitled action; that he served the above and foregoing Amended

Complaint upon the above named defendant at Wallace, Shoshone County, State of Idaho, on the 29th day of August, 1916, by depositing in the United States Post Office at Coeur d'Alene, Idaho, an envelope addressed to Featherstone & Fox, the attorneys for the above named defendant, at Wallace, Idaho, which said envelope at said time contained a true and correct copy of the said amended complaint, and that affiant, before depositing said envelope in said post office, prepaid the postage thereon; That at all of said times there was and yet is daily communication by mail between said cities of Coeur d'Alene and Wallace, Idaho.

R. E. McFARLAND,

Subscribed and sworn to before me this 29th day of August, A. D. 1916.

JAS. H. FRAZIER,

(N. P. Seal.) *Notary Public in and for the State of Idaho.*

Filed August 29, 1916. W. D. McReynolds, Clerk, by Lawrence M. Larson, Deputy Clerk.

(Title of Court and Cause.)

No. 655.

DEMURRER TO AMENDED COMPLAINT

Comes now the defendant and demurs to the amended complaint of the plaintiff heretofore filed herein and for cause of demurrer alleges:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is indefinite and uncertain in this, that said amended complaint fails to show how or in what manner the defendant was careless or negligent or how or in what manner this defendant allowed the rock and ledge matter in and through which plaintiff was operating drills, and which was situated above and over the head of the plaintiff to become loose and insecure.

III.

That said amended complaint fails to show how or in what manner the defendant failed to perform its duties in inspecting the said place or in notifying the said plaintiff of the fact that the said rock and ledge matter was loose, insecure, unsafe and dangerous.

IV.

Said amended complaint fails to show how or in what manner or by what means the said defendant knew or could have known or by a reasonable inspection could have discovered that the said rock and ledge matter at the place where plaintiff was performing his duties was loose, or unsafe or insecure or in a dangerous condition, or how or in what manner or by what means the said defendant could have ascertained said facts when the same could not be ascertained by the plaintiff after having made a careful inspection of the said back, from which the rock and ledge matter which are alleged to have fallen upon plaintiff came from.

Wherefore defendant prays judgment of this its

amended demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,
Attorneys for Defendant,
Federal Mining & Smelting Company.

Residence and P. O. Address, Wallace, Idaho.
Filed Sept. 5, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 655.

MEMORANDUM DECISION ON DEMURRER TO AMENDED COMPLAINT

Nov. 3, 1916.

McFarland & McFarland, *Attorneys for Plaintiff,*
Featherstone & Fox, *Attorneys for Defendant.*

DIETRICH, *District Judge*:

I am inclined to think that the amended complaint substantially meets the views expressed at the time of ruling upon the demurrer to the original complaint, and therefore the demurrer to the amended complaint will be overruled.

Filed Nov. 3, 1916.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 655.

ANSWER TO AMENDED COMPLAINT

Comes now the defendant Federal Mining & Smelting Company and answering the allegations both material and immaterial contained in plaintiff's amended complaint, admits, denies and alleges, as follows:

I.

Admits the allegations contained in paragraphs I and II.

II.

Admits the allegations contained in paragraph III of said amended complaint, but alleges that it was not the sole and only duty of the plaintiff to operate the machine drill, but that it was likewise his duty as such employe of this answering defendant, when required to do so by the nature of his employment, to bar down rock and ore from the walls and roof of the said mine as and when necessity therefore arose, and do such other work in and about the said mine, which is commonly and generally required of miners, as might be or become necessary from time to time.

III.

Answering the allegations contained in paragraph IV of the said amended complaint, this answering defendant denies that it was its duty at all of the times mentioned in the said amended complaint to furnish and provide the plaintiff a reasonably safe place within which to work and especially denies that it was the duty of the defendants at any time to provide a reasonably safe place for the defendant to work in where the character of the place in which the plaintiff was working was created by himself and his fellow-workmen, as also where the plaintiff was engaged in doing a detail of the work; also where the plaintiff was, or ought to have been, engaged in making safe an unsafe place; in this respect this answering de-

fendant further says that at the time of the accident to the plaintiff complained of in said complaint the plaintiff was engaged in the prosecution of a detail of the work under conditions which were constantly shifting and changing by reason of the nature and character and progress of the work and was engaged, or should have been engaged, in making safe a place, *which by the failure of the plaintiff to make and render safe became and was an unsafe place in which to work.* This answering defendant denies that disregarding its duty toward the plaintiff in the premises or any duty which it owed to the plaintiff, it carelessly and negligently, or otherwise or at all, suffered the place in the said Morning Mine where the plaintiff was performing his duties as a miner to become or to remain in a dangerous or unsafe condition, and denies that it carelessly and negligently or otherwise or at all permitted the rock and ledge matter in and through which plaintiff was operating the drills of said compressed air drill or driller, or any other rock which was then and there overhanging the place where the plaintiff was performing his work to become loose and insecure.

IV.

Answering the allegations contained in paragraph V of said amended complaint, this answering defendant admits that while the plaintiff was operating said compressed air drill or driller in drilling through and into the said overhanging rock and ledge matter in the said Morning Mine, the said overhanging rock or ledge matter into which the plaintiff was drilling

gave way, broke loose and fell upon the plaintiff, but denies that in drilling into the said ledge matter, as alleged in plaintiff's said complaint, the plaintiff was engaged in the performance of his duties, but alleges the fact to be that the plaintiff negligently and carelessly drilled into the said rock and ledge matter knowing that the said rock and ledge matter was loose and liable to fall, or having the ability to ascertain this fact by a reasonable inspection which it was his duty to make with tools at his disposal, and in drilling into the said ledge matter without first barring down all loose rock, including the rock which fell, which it was his duty as a miner to do, and in carelessly and negligently failing in securing himself against the danger of the falling of the particular rock which fell. This answering defendant denies that the said rock gave way, broke loose and fell upon the plaintiff without any fault or negligence on his part, but specifically alleges that it fell due and owing to the carelessness and negligence of the plaintiff in failing to guard against its falling and in failing to bar the same down as was required of him by virtue of the duty which he owed to himself and this answering defendant, while in the employ of the defendant. This answering defendant has not information or belief sufficient to enable it to answer as to whether or not about nine tons of the said rock fell upon the plaintiff and therefore denies the said allegation and each and every part thereof and the whole thereof, and this answering defendant says that it has not sufficient information or belief to enable it to answer

whether or not the said or any portion of the said rock remained upon the plaintiff for a period of twenty minutes or any other time or at all, and therefore denies the same. This answering defendant denies that the plaintiff was thereby or at all greatly or otherwise hurt, bruised, wounded or crippled, and denies that the plaintiff was by the reason of the falling of the said rock and ledge matter, or otherwise, greatly injured in his head and his right side or injured in his head or right side at all, and denies that his right foot was greatly or otherwise or at all crushed; and denies that the ligaments thereof were torn or bruised, and denies that the joint of his right foot was greatly or otherwise or at all bruised, sprained and wrenched, and denies that the right arm and shoulder of the plaintiff were greatly or otherwise or at all bruised and crippled, and denies that his back was twisted, wrenched or crippled at all.

V.

Answering the allegations contained in paragraph VI of said amended complaint, this answering defendant denies that by reason of the said injury or any injuries sustained by the plaintiff he has suffered or still suffers any great mental pain or anguish; denies that by reason of the alleged or any injury to plaintiff's head his hearing has become impaired at all; and denies that it is painful for him to eat or to open his mouth at all, and denies that in consequence of the said alleged injuries or any injuries to his right shoulder and arm he has been rendered and is unable to straighten out or

otherwise use his said arm; denies that in consequence of said alleged injury or any injuries received to plaintiff's right foot, he has been and is unable to bear his weight upon the said foot, and denies that he is crippled and lame therein; denies that by reason of the said alleged injuries to plaintiff's back the same has become or is at all greatly weakened, and that at all or at any time the same pains him, and denies that in consequence of all or any of the said alleged injuries the plaintiff is unable to sleep but very little during the night; and denies that his said injuries are so painful or painful at all, that by reason thereof, or any of them, he is kept awake during most of the night or kept awake at all.

VI.

Answering the allegations contained in paragraph VII of said amended complaint, this answering defendant denies that prior to the time of receiving the said alleged injuries the plaintiff did not know or had no means of knowing and by the exercise of due care and diligence could not have discovered the dangerous condition of the place at, in and where he was drilling, and denies that he did not know and had no means of knowing, and by the exercise of due care and diligence could not have discovered that the said rock and ledge matter then and there being above and over him in the said Morning Mine where he was drilling was loose, insecure or otherwise dangerous, but alleges the fact to be that the plaintiff knew or in the exercise of due care, caution and dili-

gence he could have discovered and known that the said overhanging rock and ledge matter was liable to fall, and that it was negligent and dangerous on his part to have drilled into the same.

Further answering the allegations contained in said paragraph VII, this answering defendant admits that the plaintiff commenced his work on the night shift at about the hour of six o'clock on said day, but as to whether or not prior to commencing the said operations of drilling the plaintiff examined or inspected the place in which he was performing his said duties, this answering defendant says it has not sufficient information or belief to enable it to answer and therefore denies the said allegations and each and every part and the whole of them; this answering defendant denies that the plaintiff examined the said overhanging rock and ledge matter with as much care and caution as he was able to exercise. and denies that the plaintiff was not provided with any means for testing the condition of the said overhanging rock and ledge matter; and denies that he had no instrument with which to do so, but alleges the fact to be that ample and sufficient tools, to-wit, picks, and bars were furnished to the plaintiff to test and bar down loose rock; and that it was his duty to make such test and bar down any and all loose rock, including the rock which fell, and this answering defendant denies that the plaintiff did not discover and could not have discovered by the exercise of reasonable care and caution that the said rock and ledge matter was loosened and insecure and liable to fall

upon him; denies that under the terms of plaintiff's employment, it was not his duty to test the condition of the overhanging rock and ledge matter before plaintiff commenced the performance of his duty in the operation of said drill or driller, but alleges the fact to be that it was the duty of the plaintiff to make such inspection and to bar down the said rock or otherwise secure himself against the fall thereof, and denies that this answering defendant negligently failed to make such inspection; denies that the plaintiff prior to receiving the said alleged injuries and prior to the time he commenced the performance of drilling, had a right to believe and did believe that the defendant had carefully inspected and tested the condition of the said overhanging rock and ledge matter, and denies that the plaintiff had a right to believe or assume that the condition thereof was safe; denies that this answering defendant could prior to the time plaintiff received said alleged injuries, by the exercise of ordinary care, caution and diligence, have discovered said unsafe and dangerous condition of said rock and ledge matter in the place where plaintiff was performing his duties; denies that it negligently and carelessly failed to do so, and denies that it carelessly permitted plaintiff to enter upon and continue the performance of his said duties without apprizing, warning, or notifying him of said dangers, but alleges the fact to be that it was not the duty of this defendant to make inspection of the said rock and ledge matter, nor was it the duty of this answering defendant to apprize, warn or notify the plaintiff of the dangers attending said work.

VII.

Answering the allegations contained in paragraph VIII of the said amended complaint, this answering defendant is not advised as to whether or not before sustaining the alleged injuries he was a strong, healthy, able-bodied man of the age of thirty-eight years, and therefore denies the said allegation and each and every part and the whole thereof, but admits that the plaintiff was earning four dollars and a half ($4.50) per day, and denies that the alleged injuries or any injuries sustained by the plaintiff are permanent and lasting, and denies that the plaintiff will continue to suffer great physical and mental pain in consequence thereof, or any physical or mental pain whatsoever during the remainder of his life or at all; denies that in consequence of said alleged injuries plaintiff's earning capacity has been greatly or at all diminished, and denies that it has been totally or at all impaired.

VIII.

Answerig the allegations contained in paragraph IX of the said amended complaint, this answering defendant denies that by reason of the said alleged injuries or any injuries sustained by the plaintiff as alleged in plaintiff's complaint, he has been or is damaged in the sum of fifteen thousand dollars ($15,000.00) or any sum whatsoever.

Further answering plaintiff's said amended complaint and by way of further, separate and affirmative defenses thereto, the defendant alleges:

That, if the plaintiff was injured as alleged in his said amended complaint, he was injured by and through the negligence of a fellow servant or fellow servants of the plaintiff.

That if the plaintiff was injured as alleged in plaintiff's said amended complaint, he was injured by and through a risk of his employment which he assumed, namely, the risk of the alleged defective condition complained of in his said amended complaint.

That if the plaintiff was injured as alleged in said complaint or injured at all, he was injured by his own negligence and carelessness and contributory negligence in failing to bar down or otherwise secure the place in which he was working, or, in case it was impossible for him to do so alone, then in failing to secure assistance in doing so or in failing to advise his shift boss of such condition, and of the need of assistance in barring down the ground where plaintiff alleged he was injured and in failing to make the same reasonably safe.

Wherefore defendant prays that the plaintiff take nothing by this action, and that the defendant recover its costs herein expended.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Residence and post office address: Wallace, Idaho.

State of Idaho,
County of Shoshone,—ss.

WILLIAM J. HALL being first duly sworn on his oath deposes and says:

That he is the Assistant General Manager of the Federal Mining & Smelting Company, the defendant in the above entitled action, and as such Assistant General Manager is authorized to, and makes this verification for and on behalf of said defendant company, that he has read the foregoing answer and knows the contents thereof, and that he believes the same to be true.

WILLIAM J. HALL.

Subscribed and sworn to before me this 16th day of November, A. D. 1916.

D. R. TREAT,

(Seal.) *Notary Public for the State of Idaho, residing at Wallace, Idaho.*

Filed Nov. 18, 1916. W. D. McReynolds, Clerk, by L. M. Larson, Deputy Clerk.

(Title of Court and Cause.)

No. 655.

VERDICT

We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant in the sum of $7,500.

J. J. HURM, Foreman.

Filed Nov. 23, 1916,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

JUDGMENT ON VERDICT

This action came regularly on for trial in open court on the 23rd day of November, A. D. 1916, be-

fore the court and a jury of twelve good and lawful men drawn and selected from the Northern Division of this District to try said cause, McFarland & McFarland appearing as attorneys for plaintiff, and Featherstone & Fox appearing as attorneys for defendant, whereupon witnesses were sworn and testified and documentary evidence introduced on behalf of both plaintiff and defendant, and, after the introduction of all of the evidence as aforesaid, the cause was argued by respective counsel, and after argument of said counsel the court instructed the jury; thereupon the jury retired to consider of their verdict and subsequently to-wit, on the 23rd day of November, A. D. 1916, returned into court and announced that they had arrived at and returned their verdict, which said verdict was duly filed and is in words and figures following, to-wit:

"*In the District Court of the United States for the District of Idaho, Northern Division.*

Louis Anderson, *Plaintiff,*

vs.

Federal Mining and Smelting Company, a corporation, *Defendant.*

No. 655.

VERDICT

We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant in the sum of $7,500.00.

J. J. HURM, Foreman."

And thereupon said jury was duly polled, and each of said jurors was asked if said verdict of Seventy-

five hundred dollars was his verdict, and each and all of them replied that it was.

Now, Therefore, by reason of the law and the premises and the verdict aforesaid, it is hereby *Ordered, Adjudged and Decreed* that Louis Anderson, the above named plaintiff, do have and recover of and from Federal Mining and Smelting Company, a corporation, the above named defendant, the sum of Seventy-five hundred dollars ($7500.00), together with plaintiff's costs and disbursements necessarily incurred herein, and taxed in the further sum of Sixty-five and 20-100 ($65.20) dollars, which said sums are to bear interest at the rate of seven per cent per annum from the date hereof.

Dated this 24th day of November, 1916.

Filed Nov. 24, 1916,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

BILL OF EXCEPTIONS

Be It Remembered, That heretofore, and on, to-wit, the 23rd day of November, A. D. 1916, being one of the days of the November Term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich presiding as Judge of said Court, and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. McFarland & &McFarland appearing for the plaintiff, and Messrs. Featherstone & Fox appearing for the defendant, and thereupon

the plaintiff, to maintain the issues on his part, introduced the following evidence, to-wit:

Mr. R. E. McFarland, one of the attorneys for the plaintiff, made the following statement to the Court, to-wit:

If the Court please, this plaintiff does not talk plain. He can't understand the English language. I can't understand him when I am talking to him, and I have found it necessary to have an interpreter, and I have brought Mr. Raley here, to ask that he be permitted to interpret for us. I will state that Mr. Raley interprets up in Judge Wood's court, and he did it this last term in a case in which I appeared. I would like to have him sworn. I understand that Mr. Fox also has an interpreter, and I have no objection to his interpreting for him. I would like to ask that Mr. Raley interpret for my witness.

Whereupon Mr. Fox, one of the attorneys for the defendant, made the following statement to the Court, to-wit:

If the Court please, my information is to the contrary, that this witness can talk perfectly good English. He was employed in the mine there, and can talk very plain.

Thereupon Mr. McFarland made the following statement to the Court, to-wit:

I know he can't, and I have an interpreter, Your Honor.

Thereupon the Court made the following statement, to-wit:

Well, we will try it; he may be sworn.

Whereupon, LOUIS ANDERSON, the plaintiff, was called, sworn and examined in the English language, and testified in said language in answer to questions propounded to him during his entire examination, both direct and cross, and without an interpreter, as follows, to-wit:

DIRECT EXAMINATION by
MR. McFARLAND:

Q. What is your name?

A. Louis Anderson.

Q. Where do you live?

A. Mullan.

Q. How long have you lived there?

A. I have lived there about,—next spring it is two years.

Q. What is your business?

A. Miner.

Q. How long have you been mining?

A. What mine do you mean?

Q. How long have you been mining altogether?

A. About eighteen or nineteen years.

Q. In what capacity? What kind of work have you done in mines?

A. I was doing the last fifteen years running a machine.

Q. You have acted as a machine man for fifteen years?

A. Yes, sir.

Q. In what mines have you worked in the Coeur d'Alenes?

A. In the Morning.

Q. What other mine?

A. That is all the mine I worked in in the Coeur d'Alenes.

Q. Have you worked there fifteen years?

A. No, not there, but in the United States.

Q. Where else besides the Coeur d'Alenes have you worked in a mine as a machine man?

A. I worked in Michigan, around Kerserg.

Q. How old are you?

A. Thirty-eight.

Q. When did you first go to work for the defendant, the Federal Mining and Smelting Company? When did you first commence to work for the Federal Mining and Smelting Company?

A. I can't understand just exactly what you mean.

Q. When did you first go to work in the Morning mine?

A. In 1915 when I first gone to work.

Q. What month?

A. I couldn't tell you what month; it was in the spring time any how.

Q. Had you worked there up to the time you got hurt?

A. Yes.

Q. What kind of work were you doing in the mine all of that time?

A. In the Morning mine?

Q. Yes.

A. Machine man.

Q. Explain to the jury what a machine man does in a mine, and what kind of a machine he uses.

A. I used a buzzer. I don't know; it has got another name, but they call it a different name.

Q. Tell the jury what kind of a machine that is, and what is done with it in a mine.

THE COURT: What do you do with the machine? How do you operate it?

MR. McFARLAND: Show the jury what you do with that kind of a machine.

A. Just make a hole straight up, just a little bit on an incline.

Q. What makes that hole?

A. The steel in the drill.

Q. The steel that is put in this drill or driller, is that what you call it?

A. Yes, the drill.

Q. How is that machine run?

A. Just got a hammer inside, and that hammer, knock the end of the steel, and then in about six inches, when the steel gone in there, and then take the steel, and you got a handle and turn, and the machine looks like a pipe something, an air pipe, and something like that, but take about four inches, maybe in some places it might be a little more, and then turn it by hand like that, holes around, the hammer and the drill, and put down against and bored.

Q. I will just ask you, is that machine run by air?

A. Yes, it is run by air.

Q. What are these holes made up in the mine for? What do you put these holes up in the mine for?

A. They are blasted out, take the ore out.

Q. Now, on the 8th day of May last were you

working there in the Morning mine of the defendant?

A. What is that?

Q. On the 8th day of May last were you working in the Morning mine, for the defendant?

A. Yes.

Q. What time did you start to go to work that day?

A. That was in the afternoon, when I started to go, about half past three.

Q. What did you first do when you got into the mine? Tell the jury what all you did when you first went into the mine that day?

A. I got the machine, and look around in the places, if it is safe, and you have got to look that over when the muckers come, and if you see it loose you have got to take it down.

Q. What did you do that morning? Did you find any tools?

A. No. I couldn't find the right kind of tools, what I used.

Q. What kind of tools was used for knocking down the rock or testing the inside of the mine?

A. With a bar.

Q. What kind of a bar was that? How long and how big?

A. Some bars are a little longer and some shorter. You have to use it, this kind of a bar, a high place you have got to get a long bar, and in low places you have got to get a short one.

Q. Did you find a bar there that night?

A. No.

Q. Did you find your drills as soon as you went into the mine?

A. I find a pick on the side there and some steel there, and that is all the tools I have.

Q. Did you do anything towards testing the mine to see if it was safe?

A. I was barring down the loose. I was looking for a bar first, but I couldn't find the bar, and the muckers was working pretty close, and I take a piece of steel and a drill and take them down, and the muckers can work. Then I thought I work to the place for the bar, but I was afraid the loose come down, and might be hurt, and I would get the loose down with a bar and pick and them tools that I had, and I couldn't,—my machine—looked for the bar around, and I couldn't find the bar, and I come back to the machine, and I thought I try to take that machine and feel if the place was safe. I take the pick and bar and make it as safe as I could, but I aint sure that place is safe yet. I take the machine, and I put the steel in and start her and drill just a little bit with the air, with that hammer, what used to be trying the steel, when they make the hole, but just a little bit, and just when I feel with my hand that steel, and put my other hand at the roof and feel, and come in that little air and work that machine, and can't make that loose rock,—you know when rock is loose or not,—you can find out that way, some big loose,—it is pretty hard to find the back loose there, three or four feet big, it is pretty hard to find

out with a bar, but you put this steel and the drill, and give it just a little bit of air, when the machine start to work, and you put another hand in the roof and the rock, and feel it, and you can feel that, whether it is loose or not. But the shifter come at the same time—

Q. What was his name?

A. Brown.

Q. What was his first name, do you know?

A. I couldn't say exactly what it is.

Q. How long had he been shift boss in that mine?

A. I couldn't tell you. He was shift boss before I come in the mine.

Q. Before you went in there?

A. Yes.

Q. What did your shift boss tell you?

A. The shift boss asked me if I aint doing nothing here. I says yes, I was barring down the loose, and I couldn't find no bar, and I looked for a bar but couldn't find them; I had the pick and tools I had there, and I take it as I come.

Q. What else did he tell you?

A. He said never mind that, that is all right, and start to work and get them holes drilled, and get the holes ready to blast tonight.

Q. Did he say anything to you about whether he had tested it himself?

A. No. He said he found out that the place was all right.

Q. He said he had found out that the place was all right?

A. Yes.

Q. What did you do when he told you that?

A. I started to drill, when he said that place is all right, started to drill and work.

Q. How long did you drill before you got hurt?

A. I think I drilled not more than ten minutes; I couldn't tell you.

Q. Then what happened?

A. Then all the roof come down.

Q. Do you know about how much rock fell, or could you tell?

A. It is pretty hard to tell.

Q. Did it fall on you, this rock fall on you?

A. Yes, the rock fell right on top of me.

Q. Did it hurt you?

A. Why, yes.

Q. Where did it hurt you? Tell the jury, so the jury will know this.

A. It hurt my right side, my shoulder, and I couldn't do the work.

Q. Tell the jury where else it hurt you, if any other place.

A. And it hurt my foot and my back and my head, and I couldn't hear with this ear hardly at all. And make my head ache. I move my arm a little more and it gets sore, that way, and make my head sore. And I couldn't sleep at night, after I had been hurt. It makes me nervous. I dream and I couldn't sleep, sometimes I couldn't sleep before morning, daylight, come.

Q. When you were hurt did you go anywhere, or

was you taken anywhere, right after this rock fell on you? What was done with you?

THE COURT: Did you go to a doctor or a hospital?

MR. McFARLAND: Q. Did you go to a doctor or a hospital, or anywhere?

A. I come,—took me to the hospital, out of the mine.

Q. Two men took hold of you, did they? Two men took you out of the place from under the rock?

A. No.

Q. Well, when this rock fell on you did anybody take the rock off of you?

A. Yes.

Q. Go on and tell the jury all about that.

A. Well, I couldn't explain—

THE COURT: Yes, you are doing very well. Just go on and tell the jury what you did.

MR. McFARLAND: Q. Did two men get you up from under the rock?

A. Yes.

Q. Then what did they do with you, what did they do?

A. I think it was more than two men. I didn't see nobody. Some time I hear somebody work on top of me. I couldn't see anyone. I was buried under the muck. I couldn't see nobody, but I hear somebody working on the top of me.

Q. Where did they take you then? Did they take you out of the mine?

A. Yes, they take me out of the mine.

Q. Where to?

A. To the station first, and then put me on the truck and take me out to the foreman's office there, when I see it first done.

Q. And then where did they take you from the foreman's office?

A. They take me to the hospital.

Q. What hospital?

A. The Sisters Hospital, in Wallace.

Q. How long were you there in that hospital?

A. Well, I don't remember just exactly. I was pretty sick when I left the hospital; I don't remember; about ten or twelve days, I think; and I feel pretty bad yet when I left the hospital.

Q. Have you had a doctor to treat you?

A. In the hospital?

Q. Yes, and since you have come out of the hospital?

A. Yes.

Q. What doctor did you have?

A. Mowry.

Q. How long has he been treating you for your injuries? How long has he been doctoring you?

A. Right along all the time.

Q. What did he do for you?

A. He give me electric, around here in my shoulder and my arms.

Q. Did he give you any medicine?

A. He give me liniment.

Q. Did he give you any medicine to take inside?

A. Yes, about three months, or two months ago;

I was sore here, with a big lump here (indicating).

Q. A big lump in the stomach?

A. Yes, and I told the doctor I don't know what is the trouble, and I find it is come out, and I had two bottles of medicine, but never get no better yet, get worse all the time.

Q. How long did he keep up this electric treatment, Doctor Mowry?

A. Just about five minutes, something like that.

Q. How long,—ever since that time? When did you go to Dr. Mowry last to be doctored?

A. Last Sunday I was there last.

Q. How often have you been going there for him to treat you?

A. Every ten days.

Q. Every ten days?

A. Yes, sir.

Q. Were you ever hurt before this time? Were you ever hurt before you got hurt in this Morning mine?

A. No, sir.

Q. Was you in good health or poor health, or how was your health, before you got hurt?

A. Good.

Q. Was you ever sick any?

A. No.

Q. How did you lose your eye?

A. That was small pox.

Q. When was that?

A. I don't remember. I was a little kid. My mother told me it was the small pox that I lose that eye, —about two or three years old.

Q. You say you haven't been able to hear good since you had this accident,—you can't hear so well out of one ear?

A. No.

Q. You may tell the jury if you have any pain, and, if so, where, after this accident.

A. I don't understand just what you mean.

Q. Well, did your wounds or injuries hurt you much? You understand you got hurt in the mine. Now did those places where you were hurt, hurt much, make you feel bad, pain?

A. Sure.

Q. Where,—tell the jury every where.

A. In my shoulder and my arms and my back and my foot, right hand.

Q. How about your head?

A. Yes, and my head.

Q. And about your stomach?

A. My stomach.

Q. Did it affect you when you went to eat? Did your mouth hurt when you went to eat?

A. Yes, and I had,—sometimes when I eat hard bread or something, and I open the mouth a little more, it hurts right there, the cut right there, it hurts right there (indicating), and I bite a little harder and it would hurt.

Q. How did your hurts affect your sleep? How did your hurts affect your sleep? Could you sleep good after that?

A. No.

Q. How much were you earning up to the time that you got hurt, Louis?

THE COURT: How much a day were you getting, how much pay?

A. The day when I was working?

THE COURT: Yes.

A. Four and a half.

MR. McFARLAND: Q. Have you been able to work since that time?

A. No.

Q. Can you work now?

A. No, sir.

Q. Now, when you went into the mine to go to work that night, was there any holes left up there that had been bored, any holes up in the mine, when you first started to work?

A. Yes, there was two holes there already, and one started, but the steel stuck in the hole, and they started another hole close to it.

Q. Did you bore those holes, or did somebody else?

A. Not one hole.

Q. What had been the custom there in the mine about leaving holes already drilled that way for the next shift?

A. I couldn't understand.

THE COURT: Why is that material, Mr. McFarland?

MR. McFARLAND: I don't see that it is Your Honor. Only as a matter of precaution I asked it, Your Honor.

Q. From your experience as a miner, I will ask you to state whether your drilling in the mine there caused that rock to fall on you?

A. I can't understand that.

MR. FOX: Ask him why the rock fell.

MR. McFARLAND: Why did the rock fall down on you? What made the rock fall down on you?

A. That is more than I know. It must be loose; it can't come down when it aint loose.

THE COURT: Now ask him whether he made it loose by drilling.

MR. McFARLAND: Q. Did you make it loose by drilling?

A. No.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. You say, Louis, that you didn't make it loose by drilling?

A. It must be loose before.

Q. It was loose before?

A. Yes, that is, it was loose before. If it was solid it would never come down.

Q. But you drilled into this rock that fell, didn't you?

A. Yes, I drill that time.

Q. You drilled right into the rock that fell?

A. Yes.

Q. And you mean to tell the jury that though the rock was loose before it fell, still you didn't help make it looser by drilling into it?

A. It wasn't loose from what I drilled.

Q. Your drilling had nothing to do with breaking it down, is that it?

MR. McFARLAND: I think he has answered that twice.

THE COURT: You will have to put your questions in a very direct way.

MR. FOX: I will, if Your Honor please.

Q. Now, Louis, when you go into the Morning mine, when you start to work there, you get a copy of the rules, don't you, the mining rules there?

A. What rules do you mean?

Q. The mine rules, telling you what you must do underground, don't you?

A. I don't see any.

Q. You never saw the rules, is that it?

A. No. I didn't know what the mining rules was.

MR. FOX: Mark this for identification, please.

A certain paper was thereupon marked DEFENDANT'S EXHIBIT NO. 1.

Q. Now I show you, Louis, a piece of paper marked Defendant's Exhibit No. 1. Just look at that.

A. I couldn't read it.

Q. You can't read it?

A. No, sir.

Q. Do you know your signature when you see it?

THE COURT: Your name.

MR. FOX: Q. Do you know your name written when you see it, when you write it yourself?

A. I didn't write it.

Q. Did you write that? Just tell the jury whether you wrote that or not.

A. Yes, that is my hand; I wrote that, yes.

Q. Did you write underneath that also, "I understand these rules, Louis Anderson."?

A. How could I write? I can't write.

Q. You never wrote that?

A. They put my paper like that and put your name there, and they didn't say anything else.

Q. You wrote your name there?

A. Yes.

Q. But you didn't write, "I understand these rules"?

A. How could I write if I don't know.

Q. Did you write there, "I understand these rules"?

A. Yes.

Q. You wrote that there, did you?

A. Yes.

MR. McFARLAND: He doesn't understand you.

MR. FOX: Yes, he does understand me.

A. The office had, somebody else write just the same as here, and the office man told me that, told me to write that way, and I write that here.

Q. But you wrote it there?

A. Yes, I wrote it. There was another slip there in the office, and they give me another slip, and somebody else write it just the same, just there, and copy, I would write it that way. I didn't know that to write myself.

Q. Did you write that?

A. I write it.

Q. You wrote that?

A. Yes, sir.

Q. They gave you a copy of these rules, didn't they?

A. This here?

Q. Yes.

A. Yes.

MR. McFARLAND: Let me look at that.

MR. FOX: I haven't offered it yet. I may never offer it.

THE COURT: Let us proceed in order. It isn't necessary that you see it at the present time Mr. McFarland.

MR. FOX: Q. Louis, isn't it a fact that the man in the office who gave you a copy of these rules asked you if you understood them?

MR. McFARLAND: We object to that as not proper cross examination, and not material at this time, and, if material at all, it is part of their defense. This witness hasn't been interrogated upon this subject or any kindred subject.

THE COURT: Overruled.

(Last question read.)

THE COURT: Answer the question, Mr. Anderson. Did you understand the question?

MR. FOX: I will ask him again.

Q. Isn't it a fact that the man in the office who gave you a copy of these rules asked you at the time he gave the rules to you whether you understood the rules?

A. I can't understand just what you said, and I couldn't tell you either what—

Q. Did you have any talk with the man in the office when you went to work?

A. Yes, I talked to the man.

Q. Did he ask you whether you understood these rules?

A. No.

Q. He didn't?

A. No, he didn't ask me.

Q. Now you say you have been mining for sixteen years?

A. Yes.

Q. In the United States?

A. In the United States, yes.

Q. How long have you mined in the Coeur d'Alenes? How long have you been up there in the Coeur d'Alenes?

A. That is the first mine I worked in, in the Morning.

Q. How many months did you work in the Morning?

A. I couldn't tell you exactly, but I think about a year; it might have been a little more or a little less.

Q. On what floor or level were you working?

A. On the sixteen hundred.

Q. On the sixteen hundred level?

A. Yes, sir.

Q. And what floor from the sixteen hundred?

A. On the eighth floor.

Q. How long had you worked on the sixteen hundred level?

A. About three or four months, I guess.

Q. In other words, you had worked, doing this same character of work that you were doing on the

day you were injured, you had worked at that for three months, had you?

A. Yes, between two and three months.

Q. In the same place?

A. No, not in the same place.

Q. Well, in that immediate vicinity, right in that neighborhood, and near where you got hurt?

A. I couldn't understand that.

Q. I will withdraw the question. You worked for three months near the place where you got hurt, did you?

A. I couldn't—

Q. Where did you work for the last three months before you were hurt?

A. I was working in fourteen before, until I moved to sixteen.

Q. And you worked on the sixteen hundred foot level for three months, did you?

A. Yes, I guess about two or three months, something like that.

Q. What were you doing on that level during that time?

A. I was doing machine work, drilling.

Q. When you went to work in the Morning mine you hired yourself out as an experienced miner, didn't you?

A. Yes, sir.

Q. You told the foreman that you knew all about the duties of a miner, or a machine man, underground?

A. Yes, sir, and I know too.

Q. And you did know the duties of a machine man underground, did you?

A. I knowed it, yes.

Q. You know the duties of a machine man under the customs in that mine, the first thing he must do is to bar down?

A. Yes, sir.

Q. And when you went on shift that day you knew the first thing you must do was to make your place safe by barring down, isn't that correct?

A. That's right.

Q. Now, as a matter of fact, Louis, these tools that you speak of, these picks and these bars, are used by the miners for the purpose of making the place safe, aren't they, these picks and the bars, they are used to make the place safe?

A. Yes.

Q. And the miners use them, don't they?

A. Yes.

Q. And these picks and these bars are in the stopes, aren't they? The picks and the bars are in the stopes, aren't they?

A. Not at that time.

Q. There were no picks and bars in that stope?

A. No, not at that place.

Q. How big was the place where you were working, that is, how long was it, and how high was it?

A. That stope?

Q. The particular place where you were working, how high was it?

A. Right on the floor?

Q. How high from the muck pile?

A. About six feet on the muck pile, about six or seven feet.

Q. In other words, you were taking the second cut, is that it?

A. Yes.

Q. The first cut had been taken by the shift previous?

A. I couldn't understand.

Q. There had been some ore shot down there, hadn't there?

A. Yes, sure.

Q. There was a muck pile there?

A. Yes.

Q. How high was the muck pile?

A. Well, it might be six or seven or eight feet.

Q. And you set your machine up on top of the muck pile?

A. Yes.

Q. And then you started to drill in the top or the back, as the miners call it, didn't you?

A. Yes.

Q. And the top, the back or the top, or the roof, there, was six feet from the top of the muck pile, where your machine stood, about six feet?

A. About five or five feet and a half.

Q. It was so low that a man had to kind of stoop so he wouldn't touch the top, you had to kind of stoop over so you wouldn't touch the top with your head?

A. I could touch the top with my hand.

Q. You could touch the top with your hand?

A. Yes.

Q. Easily?

A. Yes.

Q. How big was this rock that was there and was loose and came down, how big a piece was it?

A. I couldn't tell you; I didn't look at it at all.

Q. When you went in there you didn't look at it at all, is that it?

MR. McFARLAND: He didn't say that.

MR. FOX: Yes, he did.

Q. I will ask you, did you look at the rock when you went into the stope?

THE COURT: What rock?

MR. FOX: This rock that came down, if Your Honor please.

A. I don't know. All the back came down.

Q. Did you look at the back at all?

A. When I went to work?

Q. Yes.

A. Sure.

Q. Did you try to bar down?

A. Yes.

Q. Did you bar down?

A. I barred down.

Q. What did you bar down?

A. I barred down the loose.

Q. Barred down the loose rock?

A. The loose rock.

Q. When you set to work under this rock that came down you said you set to work there to try to find out whether the rock was loose or not?

A. Yes.

Q. And you put your hand up against the rock, did you?

A. I didn't have time to put my hand yet. I had just put the air on the machine, and I see the shifter come around.

Q. That was Mr. Brown?

A. Yes, that was Mr.Brown.

Q. As a matter of fact, when Mr. Brown came through there he said to you, "Louis, this ground is bad; you want to bar it down." Isn't that what he said to you?

A. Who?

Q. The shifter, Brown, said to you, "Louis, this ground looks bad; you want to bar it down", or words like that?

A. No.

Q. He didn't?

A. No.

Q. Nothing like that at all?

A. No.

Q. And you then said to him, "This is all right; if it comes down I am out of the way of it; it won't hit me," isn't that what you told him?

A. I didn't understand.

Q. Didn't you then tell him that "If this slab or if this rock comes down it won't hit me; I am out of the way of it," isn't that what you told him? You understand that, don't you?

A. I couldn't understand what you mean.

Q. Didn't the shifter tell you that that was bad ground you were working under?

A. No.

Q. He did not?

A. No.

Q. Didn't you then tell him that the ground was all right where you were working?

A. Who tell him?

Q. Didn't you tell the shifter that?

A. No.

Q. Didn't you tell the shifter that if any part of it came down you were out of the way so it wouldn't hit you? Didn't you tell that to the shifter?

A. No, sir.

Q. Do you know Oscar Berg, Oscar, the timberman there?

A. They call him Andy.

Q. You know Andy Berg?

A. Yes.

Q. He was a timber man there?

A. Yes.

Q. He came through there while you were drilling, didn't he?

A. Yes, sir.

Q. Didn't Andy tell you to bar that down, that you were in a bad place?

A. No, sir.

Q. And didn't you tell Andy the same thing, that if it came down it wouldn't hit you?

A No, sir.

Q. You didn't tell Andy that?

A. No.

Q. Now, Louis, suppose there is bad ground there,

suppose you found a loose rock, and you can't bar it down, what do you do? What does the machine man do when he can't bar down the ground?

A. He has to get the timber man and put a sprag or something else in to hold that up.

Q. And when a miner finds that a piece of ground is loose and is too big to bar down, he goes and gets the timber man to help him put in the sprag?

A. Yes.

Q. There are plenty of sprags around through the stopes, aren't there?

A. Yes.

Q. You have done that lots of times yourself? You have put sprags in lots of times yourself?

A. Yes, sir.

Q. Up in the Morning mine?

A. Yes.

Q. Did you ever blast a big boulder down with dynamite?

A. Yes.

Q. They keep dynamite on the sixteen hundred foot level for that purpose, don't they?

A. Yes.

Q. There is plenty of powder down there on the sixteen hundred for the miners?

A. Yes.

Q. And the machine man goes down and gets a stick of powder, and during the noon hour blasts it down, don't he?

A. Sometimes they do that, yes, when he sees the wall, put the powder, and he can get it out and

blast it, no crack, he couldn't put no powder in no crack or nothing.

Q. There was no crack there at all?

A. No.

Q. There wasn't anything to show you about this rock, that it wasn't safe, is that what you mean? You, as a miner, couldn't tell that the rock wasn't safe?

A. I got no time to find out yet; I wasn't sure yet.

Q. Did you go down to the next floor to get a bar?

A. Yes, I was down on the next floor; it might be the third floor. I was down to the track too.

Q. And in all those eight stopes there you couldn't find a bar, is that correct?

A. No.

Q. There are no bars in that mine, in other words?

A. There might be bars some place, but I couldn't find them.

Q. Did you ask anyone for a bar?

A. I don't remember. I hurry up and look for a bar, and it might be I ask them.

Q. How many men went in on your shift? How many men went into the mine on your shift?

A. I couldn't say.

Q. Were there more than three?

A. Sure.

Q. More than ten?

A. Sure.

Q. More than thirty?

A. There might be a hundred.

Q. As a matter of fact, about a hundred and fifty men go in on your shift, don't they?

A. Yes.

Q. And a great number of these men, probably fifty or sixty, work on the sixteen hundred, don't they?

A. Who?

Q. About fifty or sixty men work on the sixteen hundred, don't they?

A. No, I don't think that much.

Q. How many,—thirty?

A. There might be twenty-five or thirty, something like that.

Q. And the machine men were doing the same kind of work you did?

A. Yes.

Q. And they too need bars, they have got to have bars too, don't they?

A. Sure, supposed to do that.

Q. Did you know any other machine men that worked there?

A. Yes.

Q. Did you know any other muckers that worked there?

A. Yes.

Q. Did you go to these men and find out if there was a bar around?

A. I couldn't remember if I asked anybody; I looked around, and it might be I asked them; I couldn't tell you.

Q. Did you go to the seventh floor? You worked on the eighth floor?

A. Yes.

Q. Did you go to the seventh floor?

A. Yes.

Q. And couldn't find a bar?

A. No.

Q. Did you go to the sixth floor?

A. Sixth?

Q. Yes.

A. No. There is nothing to the sixth floor; nobody work on the sixth floor.

Q. Was there anybody working below the sixth floor?

A. It might be, close to the shaft, on the sixth floor. That is far away.

Q. Were they working right beneath you on the fifth floor?

A. No.

Q. They were only working there on the seventh and eighth floors?

A. Seventh and eighth, and right there where I was working.

Q. And you went all over the seventh and eighth floors, did you, to find a bar?

A. Yes.

Q. And you couldn't find a bar?

A. No.

MR. FOX: That is all.

MR. McFARLAND: I believe that is all for the present for this witness.

THE COURT: Gentlemen of the Jury, during this intermission of the court and any others that may take place during the trial of this case, be care-

full to keep yourselves free from any improper influences while you are out of the court room. Don't overhear any discussion in this case and don't enter into any discussion, even among yourselves, until it is finally submitted to you. I will excuse you until two o'clock.

An adjournment was thereupon taken until two o'clock P. M., Thursday, Nov. 23, 1916.

2 P. M., Thursday, Nov. 23,1916.

LOUIS ANDERSON, heretofore duly sworn in his own behalf, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. McFARLAND:

Q. From whom did you take your orders when you were working there in the Morning mine? Who told you where to work and when to work and what to do?

A. You have to know yourself the place.

Q. I mean who told you where to work?

MR. FOX: Just let him finish his answer. He says you have to know yourself.

MR. McFARLAND: Q. What did this man Brown have to do, this shifter or shift boss there, what did he have to do?

A. He have to tell the men where to work and what to do.

Q. Did he tell you what to do and where to work?

A. Yes, sir.

Q. All the time that you were working there?

A. Yes.

Q. Now, just before you was hurt did he tell you that he had tested the roof?

MR. FOX: That has already been gone into, if Your Honor please.

MR. McFARLAND: No, I don't think so. It isn't clear in my mind. This witness was talking pretty fast and I couldn't understand everything he said, and I don't think the jurors could either.

THE COURT: Yes, that has been gone into, Mr. McFarland. He stated what Mr. Brown said to him.

MR. McFARLAND: Q. Did anyone tell you that that place where you were working was dangerous?

MR. FOX: I object to that as incompetent, and not proper, if Your Honor please. It doesn't seem to require that anybody said anything, should tell him.

THE COURT: Overruled.

MR. McFARLAND: Q. Did anybody tell you that where you was working was dangerous?

A. What does "dangerous" mean?

Q. Not good, bad.

A. No.

Q. Did anyone tell you that that rock was loose?

A. No, sir.

Q. You told Mr. Fox that you didn't have time to test, to examine and test the rock overhead.

A. Yes, I told him.

Q. Why didn't you have time?

A. Brown cut my time.

Q. How did he cut it?

A. When he tell me hurry up and get your holes and blast.

Q. If you had had time to test this place could you have found out that that rock was loose?

A. Yes, sir.

Q. Did you know that that rock was loose?

A. No, sir.

Q. Did you take Mr. Brown's word for it that everything was all right?

MR. FOX: I object to that as incompetent, irrelevant, and immaterial, whose word he took for it. That is not the proper way to get at it.

THE COURT: Objection sustained.

MR. McFARLAND: Q. Did you believe what Mr. Brown told you when he said that he had examined it, and everything was all right?

A. Yes, I believed him.

MR. FOX: I move that the answer be struck out, because it isn't shown that he had any right to rely upon such assurances.

THE COURT: The motion is denied.

MR. FOX: An exception. We are allowed, Your Honor, exceptions, without—

THE COURT: Yes, exceptions will be allowed to all adverse rulings.

MR. McFARLAND: Q. Could you, without a test or an examination, tell that the rock was loose?

MR. FOX: He has already answered that question. He said he could have.

A. Yes, but I have not the time.

MR. McFARLAND: Q. By just looking at it—could you tell without testing?

A. No.

MR. McFARLAND: That is all.

CROSS EXAMINATION by
MR. FOX:

Q. In order for you to find out that the ground was bad you had to test it, didn't you, it was necessary to test the ground?

A. To find out?

Q. To find out whether it was bad ground or good ground?

A. Yes, sir.

Q. How do you do that testing?

A. I can take the bar or anything, a piece of steel, and pound it, and find out how it sound. You can find out that. It is pretty thick and loose, and you can find out with a drill, putting a little air on it, not another machine, but with a bizzer machine, and with a hammer and the steel.

Q. Never mind about that.

A. You can go around and look at it, any crack or anything else, and find out how you are working, far away, all around.

Q. If you see a crack in the rock overhanging you, in which you are going to drill, you know that rock is dangerous, don't you?

A. Yes.

Q. These bars that you test the ground with are long pieces of steel, anywhere from four to eight or nine feet long, aren't they?

A. It is pretty hard with a long steel, pretty hard to know that, but with a short piece of steel and a bar or anything else.

Q. How long a piece of steel would it take to test this ground you were working on?

A. Just about two feet. I can judge the ground with my hand.

Q. And if you take a bar and hit the ground with a bar, a miner who is a good miner can find out whether the ground is loose?

A. Yes.

Q. You can also tell, if you put your machine on there, and start to drill in it, whether it is loose, can't you?

A. No, you can't drill it out. You have to take the bar and take that piece down.

Q. The miner does that?

A. Yes, the miner does that.

Q. Now, suppose that you don't test it with a bar, but you use a drill, you can tell by the sound of it whether the ground is loose, can't you?

A. Yes, sir.

Q. And that is the only way you can test that ground, isn't it, by looking at it, by sounding it with a bar, or by using your drill and drilling in it, that is the only way?

A. Why, and looking around, any crack or slab, or anything else, looking all around, you can find out when you have got a crack, and any slit, how far it is.

Q. And a good miner can always tell that?

A. Yes.

Q. Usually tell whether the ground is safe?

A. Yes, I can tell it, if I have enough time.

Q. What I am trying to get at is this,—if there are no cracks in the ground, the only way a good

miner can tell whether the ground is good ground or bad ground is to test it with a bar he has in his hands, or to test it with a machine drill, by starting in to drill on it, is that correct?

A. Yes.

Q. When you are working in a stope like this you are drilling up sometimes, aren't you?

A. Yes.

Q. And that is the usual way of doing it, drilling up into the back or the roof with machines?

A. Yes, sir.

Q. And the miner has his machine set up right under the ground, with the drill sticking in the top of it?

A. Yes.

Q. And this drill moves up and down and makes the holes in the top?

A. The legs of the machine—

Q. These little machines—

MR. McFARLAND: Wait a minute. He hasn't finished his answer there.

MR. FOX: Go ahead.

A. The steel don't move in the machine. The machine come up the same as you make the hole.

Q. The whole machine moves?

A. Yes. It is the tail and legs, what you call it, put on down below, they raise up, and the machine coming up, and you get the whole machine going up too, at the same time the steel move up.

Q. These little machines are built of a piece of pipe about a foot or so long, into which the air is pumped, isn't that right?

A. Yes.

Q. And this air comes in contact with the steel, and that forces the steel up against the back?

A. Yes.

Q. And these little machines are set on a kind of a leg, or legs, aren't they, standing on little legs?

A. No.

Q. How are they fastened to the ground?

A. Just a little piece, about an inch thick, or maybe a little more, when that is coming up, but I couldn't tell you.

Q. That is perfectly clear. And the miner stands right under the ground that he is drilling in? The miner has to stand or sit under the ground in which he is drilling?

A. Yes, sure.

Q. Now, every miner knows that this ground into which he is drilling is liable to come down, or part of it is liable to come down at any time, doesn't he?

MR. McFARLAND: We object to that as not cross examination, and calling for the opinion of the witness as to what every miner knows.

THE COURT: Do you mean the likelihood or the possibility? I ask that because this witness perhaps doesn't make fine distinctions between words. Do you mean it is a mere possibility?

MR. FOX: No; the ground comes down not infrequently under those conditions.

THE COURT: Yes, but you say it is likely to come down.

MR. FOX: Well, it may come down.

THE COURT: I think I shall sustain the objection, in the form in which it is.

MR. FOX: I will re-frame the question.

THE COURT: You may ask what his experience or observations have been.

MR. FOX: Now, in your experience as a miner—

A. Yes, sir.

Q. During the time you have been a miner—

A. Yes.

Q. When you have drilled in the back with one of these machine drills, you have observed rock falling down, haven't you?

A. When I was drilling?

Q. Well, at other times rock has come down by reason of your drilling it, hasn't it?

A. I can't understand what you mean.

Q. I will withdraw the question. You have drilled this way before, haven't you?

A. Yes, sir.

Q. In the back?

A. Yes, sir.

Q. Did any rock ever come down before when you were drilling?

A. Why, just that dust come down in the hole, make the hole as it come down.

Q. But haven't you seen rock come off the back?

THE COURT: Big pieces of rock, do the big pieces fall down?

A. No, I didn't see none.

Q. You never have seen any rock falling down?

A. Yes, some time I see it, some places it might be falling down on the side.

Q. And sometimes they fall down from the back, don't they?

A. Sometimes they crack, and a little piece will come down right along.

Q. Come down right along?

A. Yes.

Q. And if the ground isn't properly tested it is liable to come down in large pieces, isn't it?

MR. McFARLAND: We object to that. That seems to be a self-evident fact.

THE COURT: Yes.

MR. FOX: Well, under that statement of counsel I think that is all right, that it is a self-evident fact.

Q. You say that Mr. Brown told you what to do?

A. Yes.

Q. Where did you first see Mr. Brown that morning?

MR. McFARLAND: That wasn't in the morning. I object.

MR. FOX: Q. That day, when you went on shift there?

A. When he come in the carbide office.

Q. That is at the mouth of the tunnel, isn't it?

A. Yes, sir.

Q. Just before the shift is taken into the mine on the car?

A. Yes.

Q. And he goes into the mine with you? He went into the mine with the shift?

A. Yes, the same trip.

Q. Did he go down to the sixteen hundred with you?

A. No.

Q. Was he on the same cage that you went down on?

A. I couldn't tell you whether he went down on the same cage.

Q. Those cages, how many men are accommodated in those cages, how many men can get on those cages that take you down the shaft?

A. Well, nine,—eighteen altogether.

Q. Eighteen men can get on at one load?

A. Yes, one load.

Q. Double deck, is it?

A. Yes, Nine men in each place.

Q. Nine men on the lower deck and nine men on the other?

A. Yes.

Q. Then they have to make several trips to take Mr. Brown's shift down, don't they?

THE COURT: Well, that would appear, if there were more than eighteen.

MR. FOX: Q. Did you go down before he went down?

MR. McFARLAND: He answered that.

A. I didn't sure whether he going down before or come after.

Q. Where were you and he when he gave you the orders what to do that day?

A. He give me orders the first time he see me,

where I was working.

Q. He didn't give you any orders until after you had gotten into the stope?

A. No, not today, not before when he come in the stope where I was working.

Q. How did you know where to go to work that day?

A. He told me another day.

Q. He told you the day before?

A. It might be two days before.

Q. Had you been working in that particular place for more than two days ?

A. Yes.

Q. How long had you been working in that particular place where you were working when you were injured?

A. I think I was working about a week that time, and some time he take me in the other side of the shaft, one or two days' work on the east side of the shaft, and then come to the west side again, and the east side.

Q. In other words, you had been working in that same place off and on for a week?

A. I couldn't tell. It might be a week. I couldn't tell you that.

Q. The instructions the foreman gives you are simply where to go to, where and what to do, that is, whether you are to drill or to muck, or what, isn't that it?

A. Yes.

Q. When you went into that mine for the first

time the foreman told you, that is, the shift boss,—that was Mr. Brown, wasn't it?

A. Yes.

Q. Told you that you must look out to make your place safe, didn't he?

MR. McFARLAND: We object to that as repetition.

A. No.

MR. McFARLAND: He has answered that. He said no.

MR. FOX: No, he hasn't.

THE COURT: Well, he has answered now.

MR. FOX: Q. He didn't tell you anything about that?

A. When?

MR. McFARLAND: The same objection.

MR. FOX: Q. When you first went to work?

A. The first time I had the job and went to work?

THE COURT: I don't see that that is material, because the witness has stated that he recognized that as being one of his duties.

MR. FOX: Very well, Your Honor. I will withdraw the question.

Q. What would the shifter tell you to do at any time in reference to making the place where you were working safe?

MR. McFARLAND? We object to that as incompetent, irrelevant, and immaterial, and not proper cross examination, and not intelligible.

THE COURT: I think I will sustain the objection. You mean what did he tell him?

MR. FOX: What instructions have ever been given to him at any time by the shifter?

THE COURT: About making the place safe?

MR. FOX: Yes.

THE COURT: I just ruled on that a moment ago, didn't I, Mr. Fox? It would appear to me to be immaterial, inasmuch as this witness stated that he recognized it as his duty as a miner, when he first went in to work, to see that the place was safe for him and the muckers. He says he was doing that upon this day when the shift boss came along and told him not to give any more attention to that, and so forth.

MR. FOX: Very well, Your Honor. Before this witness leaves the stand, I now offer in evidence Defendant's Exhibit No. 1, for identification, and pass it to counsel.

MR. McFARLAND: We object to the introduction or admission in evidence of this exhibit, as immaterial, irrelevant, and incompetent, and not proper cross examination, and, if material at all, it is a part of the defendant's case; and for the further reason that this witness has shown that he couldn't read English, as testified, and that besides that, that the witness has testified that he went under the orders and instructions on this particular occasion of the shifter or shift boss.

MR. FOX: It might be that it is not proper to introduce it on cross examination under the decisions of our Supreme Court. I don't know how Your Honor rules, whether or not these exhibits may be offered and received on cross examination.

THE COURT: Oh, no; if it is material at all, or competent, it may go in at this time.

MR. FOX: I think it is the second or third rule there, Your Honor, that is material in this case.

THE COURT: You just offer it for those two rules perhaps, two and three?

MR. FOX: Two and three are the rules which I desire to offer, Your Honor.

THE COURT: I don't think they add very much to the testimony that has already been given, that is, in view of the fact that he recognized this to be his duty, but the objection will be overruled so far as those two rules are concerned.

MR. FOX: With the permission of the court I will read these to the jury:

"Federal Mining & Smelting Co. Notice to Employees. All employees must read these rules carefully before going to work:

"2. It is the duty of all employees to take sufficient time to make the examinations required by these rules, to guard against any dangers from accidents in the mine or its workings.

"3. Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and, if necessary, the foreman or shift boss must be notified."

That is all.

RE-DIRECT EXAMINATION by
MR. McFARLAND:

Q. Louis, can you read English?

A. No, sir.

Q. Was that ever read to you by anybody?

A. No.

Q. When you wrote this, "I understand these rules," what did you write it from, if anything?

A. I didn't know what that mean.

Q. Did anybody give you anything? How did you write that? Did you copy it from a paper?

A. Yes, I copy it from the table.

Q. Somebody gave you a slip with that on it?

A. Yes, and he told me to write that way.

Q. Did you understand what that meant, when you copied it?

A. Which one?

Q. This thing here,—"I understand these rules"?

A. Yes, he told me to read it and I understand.

Q. He told you to write it?

A. Yes, he told me to write it.

Q. What kind of a paper was that on when you copied it?

A. Just a little piece of a card, something like a card, and somebody write that on the table.

Q. And told you to copy it here?

A. Yes.

Q. Told you to put that same thing down here?

A. Yes, sir.

Q. At the time that you copied it and put it here did you understand what it meant?

A No, sir.

Mr. McFARLAND: That is all.

MR. FOX: That is all.

MR. McFARLAND: I will call Thomas Simih.

THOMAS SIMIH, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. McFARLAND:

Q. How old are you?

A. Thirty-nine.

Q. Where do you live?

A. I live at Mullan.

Q. What is your business?

A. My business is mining.

Q. How long have you been working in a mine?

A. I have been working a long time.

Q. How many years?

A. Oh, a long time, about twenty years.

Q. What mines have you worked in, in the Coeur d'Alenes?

A. I was working up in the Tiger and Frisco mine, the Hunter mine and the Morning mine.

Q. How long have you been working in the mines there in the Coeur d'Alenes, the big mines?

A. Oh, I have been working a long time there.

Q. Oh, about how many years?

A. Oh, I have been working in the Hunter mine about twenty-five months. I work in the Morning mine now about eight months.

Q. Do you know Louis Anderson, the plaintiff in this case, this man here?

A. Yes.

Q. Were you working there at the time he got hurt, in the Morning mine?

A. Well, yes.

Q. Did you see him after he got hurt?

A. Yes. I have been working far away, about a hundred feet from him.

Q. About a hundred feet from him?

A. Yes.

Q. What did you first notice?

A. Well, some fellows said, some muckers—

Q. Your attention was called to the fact that some rock had fallen?

A. Someone said someone is buried in the ground some place, and that is the reason I went to see.

Q. You went down there, did you?

A. I went to see who it was.

Q. And what did you find?

A. Well, I find that it was just a kind of a slide was come down.

Q. Did it fall on Louis Anderson?

A. Well, it was something kind of through the head and the slab.

Q. He was on the ground and the slab was on top of him, is that what you meant?

A. That is all.

Q. Was that a big or a little slab?

A. It was a pretty good size rock all right.

Q. About how much did it weigh?

A. Well, it might weigh six or eight tons all right.

Q. Did you help to get Anderson from under that slab?

A. Well, there was some kind of slab there between one rock laying down, between was some kind of a hole, and Louis Anderson was between two rocks, you know, it had his shoulder, you know, his head, was between two rocks, was fifteen inches between, Louis was between two rocks down; the rock kind of come on top, two rocks, maybe catch some other piece of rock, and he was tied, was all.

Q. Did you help to get him out of there?

A. Yes, I was trying to raise up that rock, is all.

Q. Did you see any bar, or crow bar, around where that rock was?

A. I see some drill, machinery.

Q. Did you see a bar?

A. Well, by God, I don't remember,—I never look for that.

Q. Did you see one?

A. Well, I see one in the place I have been working.

Q. I mean right there?

A. No; I seen the drill; maybe it was, by there, but I never seen it.

Q. What did you do with Louis when you took him out from under that rock?

A. He was down that little—Louis was down on the floor, a kind of a weakness, you know, and after that I was down, taking the ladder down, and took him up to the station.

Q. How many men carried him?

A. Two men.

Q. Was he conscious when he first got out from under the rock, was he conscious?

A. He was a little kind of out, you know.

Q. Asleep?

A. No; he was kind of tired, you know, out.

Q. Dizzy?

A. Yes; he knew a little bit.

Q. Did they put him on the muck pile for a while?

A. Just for a few minutes set down, was all.

Q. And then they carried him out of the mine?

A. He was through down the ladders with me.

Q. Are you a countryman of Louis?

A. No.

Q. You are a Serbian, are you?

A. Yes, sir.

MR. McFARLAND: That is all.

CROSS EXAMINATION by
MR. FOX:

Q. You went over there because you heard that somebody had been hurt over there?

A. Yes, sir.

Q. Did you go over there to look for steel?

A. No.

Q. While you were there trying to get this boulder off of him were you looking around to see whether you could find any bars or not?

A. Well, by Jesus, I never look, that is all.

MR. McFARLAND: You must not swear in court, Tom.

A. It is all the same anyway, that is all.

MR. FOX: Q. You say there was a bar over there where you were working?

A. Yes.

Q. What kind of a bar?

A. A bar about six foot long, something, six or seven, might be some seven, too.

Q. There were lots of them around there?

A. Sometimes there was lots all right.

Q. Well, on that day, you had plenty of them, did you?

A. I got one the place where I had been working.

Q. Were there any others in that stope, that you saw?

MR. McFARLAND: We object to that as not proper cross examination, Your Honor. We didn't direct our questions to bars where he was working, and it is not proper cross examination.

MR. FOX: Counsel brought it out.

MR. McFARLAND: No, not that.

MR. FOX: The inference that counsel seems to draw by the testimony of this witness is that there were no bars at the place where the plaintiff was working. It is manifestly proper to show that in the vicinity of where he was working there were other bars, in view of the fact that the plaintiff himself testified that he couldn't find them.

MR. McFARLAND: That is not proper cross examination.

THE COURT: The objection is sustained.

MR. FOX: Q. You say that there were two pieces of rock, one on each side of him?

A. Yes, maybe one feet high up, the big slab.

Q. Louis was between two rocks?

A. Might be a foot and a half high up.

Q. And they were laying up against his shoulder?

A. Yes, sir.

There was nothing on his back at all?

A. Well, by God, his head was in the hole, each side, between two rocks, you know. The slab was kind of—he never been here today; he would have been down in the grave yard, you know.

Q. Where was the machine?

A. The machine was under the slab.

Q. Under the slab too?

A. Yes.

MR. FOX: That is all.

MR. McFARLAND: That is all.

DR. C. E. WORTHINGTON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. You may state your name in full.

A. C. E. Worthington.

Q. Where do you reside?

A. Coeur d'Alene.

Q. How long have you lived in Idaho, Doctor?

A. Since 1888.

Q. What is your profession or business?

A. Physician and surgeon.

Q. How long have you been practicing your profession?

A. Since 1876.

Q. Are you a graduate of any regularly chartered medical school?

A. Yes.

Q. Surgical school?

A. Yes.

Q. What?

A. Of the College of Physicians and Surgeons.

Q. Are you licensed to practice medicine and surgery in the State of Idaho?

A. I am.

Q. Have you ever done any hospital work?

A. Yes.

Q. In what hospital?

A. Well, I worked in the hospital at Silver City, Idaho, and I worked in the hospital at Mullan, and I have my own hospital here, and I have worked in other hospitals.

Q. Have you ever been physician and surgeon for any corporation in the State of Idaho?

A. Yes.

Q. What corporation?

A. I was physician and surgeon for the Northern Pacific Railroad.

MR. FOX: I don't know that that enters into the qualification of a physician, if Your Honor please.

THE COURT: No. That is going into details.

MR. McFARLAND: Very well.

Q. I will ask you if you know the plaintiff, Louis Anderson?

A. Yes, sir, I know him.

Q. I will ask you whether or not you had occasion to make a physical examination of his person.

A. I did.

Q. When and where was that done?

A. It was the first of this week, probably Monday, or Tuesday.

Q. Where did you make this examination?

A. At my office in the hospital.

Q. What did you discover upon that examination in the way of injuries, if any?

A. I discovered that there was a trouble with his ankle.

Q. Just describe that to the jury.

A. Well, there is extreme tenderness of the ankle when you manipulate the foot, and there is a small amount of swelling right about there (indicating), and there was considerable tenderness of the heel.

Q. What would that indicate with reference to the character of his ailment or injury?

A. Well, it might indicate that some of those small tendons connecting the bones of the foot there had been—

MR. FOX: Just a moment. It seems to me that is pure speculation.

MR. McFARLAND: Q. What does it indicate?

A. Well, that is what it indicates.

Q. Go ahead. You didn't finish your answer, Doctor.

A. Well, it indicated that those small ligaments there may have been ruptured.

Q. Did you examine his arm and shoulder?

A. I did.

Q. And what did you discover, if anything?

A. Well, there is a good deal of soreness about the shoulder. There is an impeded movement of the arm, and down his right arm there is more or less anesthesia or loss of sensation, and also down his forearm, about his fingers, the first three fingers, the thumb and first two fingers.

THE COURT: Which arm?

A. It is the right arm, I believe, Your Honor.

MR. McFARLAND: Q. Did you manipulate his arms?

A. I did.

Q. In what manner did you do that, so as to make your test?

A. I manipulated it, all the movements the arm has, forwards and backwards and up and down.

Q. Did you make any examination of his back?

A. Yes, I examined his back.

Q. What did you ascertain from that?

A. I think there is a good deal of tenderness about the muscles of the back.

Q. On which side?

A. I think it is on the right side.

Q. Did you examine his head or his ear?

A. I did.

Q. What did you discover there?

A. Well, I am not sure about right at the point where I am laying the hand on the head whether there is a little depression of the bone there or not. There are little irregularities about the bone some-

times, but it occurred to me from the examination that there is a slight depression there; and then this tenderness on the left side of his face here that he complains of, and the sore in his ear.

Q. Did you have any means of testing whether there was actually a tenderness in the region of his temple?

A. No, I had no means of doing that excepting just to prick him with a pin or a knife that I used.

Q. Well, did he respond to this pricking?

A. Yes, he did, to that.

Q. Did you use your knife or a pin in testing his arm and shoulders?

A. I did.

Q. To see whether there was lack of feeling there?

A. Yes, sir.

Q. What was the result?

A. On a part of his arm there seemed to be a lack of feeling. He wouldn't pay any attention to it. I had him close his eyes, and I pricked him, pricked his arm with the knife, and told him to say yes if it hurt him, and up and down his arm from his elbow, and then down along here he didn't respond.

Q. How about his ear, Doctor?

A. Well, there is nothing about his ear except a sore in his ear there, and I thought at the time that I examined him that there was possibly a little hard wax accumulated, and I removed that, and the ear bled pretty freely, and instead of wax there was a little scab.

Q. Assuming that he received those injuries on the eighth day of May last, what have you to say with reference to whether or not in your opinion those injuries are permanent?

A. Well, I believe that they are, for this reason: It occurs to me that if those injuries were not permanent a man after this length of time should be well.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. Doctor, turning now to the foot or ankle.

A. Yes, sir.

Q. The only symptom from which you made a determination that something was wrong with that ankle was the fact that he complained of pain when you moved the ankle, is that correct?

A. Yes.

Q. The only symptom that you had that there was anything the matter with his shoulder was the fact that he complained of pain and loss of sensation?

A. And loss of motion.

Q. He complained of loss of motion and pain and loss of sensation?

A. Yes, sir.

Q. As a matter of fact, referring now to the depression which you state is upon the head, you are not willing to testify that that is the result of an injury, are you, Doctor?

A. I am not willing to testify that that is an ab-

normal condition in his case, but it looks to me like it is; but I wouldn't say positively.

Q. You think it is simply an abnormal condition of the cranium in his case?

A. It has the appearance of being a slight depression there, but we find those depressions sometimes on normal persons.

Q. Persons perfectly normal?

A. Yes.

Q. If the depression had been made there by a fall of rock from a stope upon a man's head sufficient to send him to the ground you would expect that he would have to have an operation?

A. Not necessarily.

Q. But it would severely incapacitate him, so much so that he wouldn't recover to the extent that he is recovered at the present time?

A. That is a question, you know. Some of them it might do that with, and others it might not.

Q. Then if he has recovered to the extent that he has recovered at the present time you wouldn't lay any stress upon that depression being serious, even though it were made by rock falling on the head?

A. If that depression was made by rock falling on the head I would consider it serious.

Q. And there should be other symptoms, probably paralysis?

A. Not necessarily paralysis, but you might have the external table of the skull depressed, and at the same time it would either rupture or compress those

veins inside of the bones of the skull, in what we term the—between the two tables of the skull.

Q. I understand you to say that if a falling rock had made that depression it would be a serious injury?

A. I didn't say that. You misunderstood me.

Q. You wouldn't consider it a serious injury?

A. I don't think you understood me to say that either.

Q. I would like to find out what you said.

A. I said if it was from an injury it would be a serious matter, if the depression there interfered with the circulation.

Q. It would be so serious that you would expect to find some symptoms throughout the body that would indicate that there was pressure at that point?

A. No. The external table of the skull may be depressed without depressing the internal table at all, and in that case the veins that are between the two tables of the skull might be shut off or injured.

Q. In what way then would you consider that that was serious?

A. And you might have numbness of the parts, of the face there; you might have headache, you might have trouble with the eyes; and you might have trouble with the hearing.

Q. Yes. What else?

A. That is all.

Q. That is all, is it?

A. As to that, yes.

Q. Now, he hasn't any numbness of those parts, has he?

A. I think he has, right alongside of the face here.

Q. And you think that might be the result—

A. That might be the result of that.

Q. He didn't complain to you of any headache?

A. All the time; I said he was complaining of the headache more or less all the time.

Q. And of course the only way you have of telling that he has a headache is by taking his word for it?

A. You have got to.

Q. And of course the only way you have of telling whether it is paining him here on the side of the face is by taking his word for it?

A. About the pain, yes.

Q. But that is all you found?

A. I found that and the numbness there. He didn't respond when you pricked the side of his face.

Q. You have to take his word for that too?

A. If he shuts his eyes you can tell whether he flinches or not.

Q. Now, Doctor, it is his left arm which you say showed the numbness, or was it his right arm?

A. His right arm.

Q. And the numbness was manifested in what fingers?

A. In the thumb and the first and second fingers of the right hand, and a part of the third finger, I think it was.

Q. Which part of the third finger?

A. Next to the center.

Q. What nerves feed those fingers?

A. The radial and ulnar nerves.

Q. And what portion of those fingers do the radial and ulnar nerves serve, that is penetrate?

A. They penetrate along through the front part and along each side.

Q. How about the inside of the hand, doctor?

A. Well, not so much so, I don't think, on the inside.

Q. What nerve is it that runs into the hand?

A. The radial nerve affects those fingers more particularly, or branches from the radial nerve.

Q. On the inside of the hand which nerve is it?

A. It would be the branches of the same nerve there.

Q. Branches of the radial nerve?

A. Yes.

Q. Would you give us the name of the nerve?

A. I can't give you the names of them.

Q. You can't give us the names?

A. No, I can't give you the names of them, because I have only designated them as branches of the radial nerve.

Q. And you say the ulnar nerve also runs into the thumb?

A. On that side of the hand.

Q. Runs into the thumb?

A. I didn't say that. You asked me the question, what nerve supplies the hand, and I said the ulnar nerve.

Q. No, I asked you what nerve supplied those fingers which you say—

A. I told you the radial nerve.

Q. What does the ulnar nerve do, then?

A. It supplies those smaller fingers on that side.

Q. Doctor, did you make any X-ray plates?

A. No, not of this case.

Q. You haven't made any X-ray plates?

A. No, I haven't made any X-ray plates at all.

MR. FOX: I think that is all, doctor.

RE-DIRECT EXAMINATION by
MR. McFARLAND:

Q. Now, in manipulating his arms, in what way do you do that?

A. I put the arm up over the head this way (illustrating), and this way (illustrating), and throwed it back, and every movement that could be made with the arm, we done that.

Q. Did you do that with both of his arms?

A. Yes, sir.

Q. What was the difference, if anything, in the movement or action of his arms?

A. In his right arm he could throw his head this way, and throw the arm clear up, so that it would be against his head,—his left arm, I mean, and on his right arm, if I throwed it up there would be a space there.

Q. What did that indicate?

A. It indicated an impaired movement of the shoulder.

Q. Did I understand you to say you found his ankle swollen too?

A. There is a little puffiness in the ankle there at the point I indicate with my finger.

MR. McFARLAND: That is all.

MR. FOX: Where is that, again?

A. (Indicating).

MR. FOX: Right about there?

A. (Indicating).

MR. FOX: That is all, doctor.

MR. McFARLAND: The plaintiff rests.

MR. FOX: I desire to make a motion, if Your Honor please.

THE COURT: Gentlemen of the Jury, you may retire for a few moments. Just go to the grand jury room.

(The jury thereupon retired from the court room.)

MR. FOX: The defendant, Federal Mining & Smelting Company, now moves this court to grant a non-suit, and to dismiss the action, upon the following grounds, to-wit:

1. That the plaintiff has wholly failed to prove that any injury which he sustained and complained of in his complaint was the result of any negligence on the part of defendant, or that the negligence of the defendant was the proximate cause of said accident and injuries.

2. If the plaintiff in this case sustained the injuries complained of, he sustained them by reason of his own negligence and carelessness, and his own contributory negligence and carelessness.

3. If the plaintiff was injured, as alleged, he was injured by reason and through the risk of his employment, the falling of rocks under the conditions stated, which was an obvious risk of his employment.

4. If the plaintiff was injured as alleged, he was injured by reason of the negligent act of a fellow servant.

(Argument and citation and reading of authorities by counsel.)

THE COURT: There seems to be just about one question here, gentlemen, and that is as to whether or not,—as to the particular emergency here, or condition,—the shift boss acted for the master, the defendant company. While these rules (referring to Defendant's Exhibit No. 1) are not very clear upon that point, I am rather inclined to take the view that such was the intention of the company in promulgating them. They provide that it is the duty of all employes to take sufficient time to make the examination required by these rules to guard against any dangers from the working of the mine. "Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe." Now it is true that the plaintiff in this case, taking his testimony for it, while he did not read these rules, and hence did not know what they contained, still he recognized that such was the custom and practice of miners in that community, and he was proceeding upon the theory that such was his duty; that is, it was his duty to make a careful examination of the particular place where he was going to work, to see that it was safe. Now, if found to be in an unsafe condition, the rule proceeds to say: "from any cause whatever, measures must be taken to remove such dangers at once and before proceed-

ing to work, and if necessary the foreman or shift boss must be notified." There would seem to be a recognition of the authority of the shift boss in matters of this kind. Otherwise there would seem to be no reason for notifying him. Suppose that this plaintiff had found, a latent danger here, a crack in the back of the stope where he was working, or suppose, having a piece of steel which he said was necessary, he had discovered that the sound indicated that a slab of this overhanging rock or roof was loose, and, not being able to satisfy himself that it would be safe to go on with the work, he had notified Mr. Brown, the shift boss, of such a condition, and thereupon Mr. Brown examined it and said, "That is all right, Louis,"—or whatever he called him,—"you go ahead and work; it is safe." It seems to me that it would be a very harsh view to take, for us to say that this miner would not have been justified in proceeding under those circumstances, or that the master would not have been responsible if the shift boss had acted negligently in giving those directions. The master doesn't say to the miner here, "If you find an unsafe condition, notify the superintendent or the general manager, or the president of the company." But it says to him, "Notify the shift boss," apparently making him a vice-principal for the purpose of determining whether or not the conditions are safe. Otherwise, if the shift boss were notified and he made some change in the situation it would still be necessary for the workman to determine whether or not it was safe, and he might come into

an open and immediate dispute with the shift boss, and what would be the result?

MR. FOX: If Your Honor please, I desire to add the further ground, if I might—

THE COURT: Yes.

MR. FOX: —to the motion. And that is, that it is not alleged in the complaint that the plaintiff was injured by reason of any direction, any negligence or otherwise, or following any direction, negligent or otherwise, of the defendant company, or of any shift boss. The only negligence alleged is the failure to furnish a reasonably safe place, the failure to furnish him with tools with which to do the work, and it is not a ground of negligence alleged in the complaint.

MR. McFARLAND: The complaint is very specific in stating that the defendant permitted the place where he was working to become dangerous and unsafe. But of course I do not have to state all of the probative facts. Now, for instance, here in the complaint—

THE COURT: One at a time.

MR. FOX: I had in substance finished. That was perfectly all right. Go ahead, counsel. I would like to have you, however, point out to the court the particular paragraph where you allege that the accident happened by reason of a direction of the shift boss.

THE COURT: That wouldn't be necessary, Mr. Fox, in the view I take; in other words, if I am correct in taking the view that the matter here consti-

tuted the shift boss a vice-principal for the purpose of seeing that the mine was kept in a reasonably safe condition, then this proof would be admissable under the general allegation that the principal, that is, the defendant, acting through the shift boss as its representative for that purpose, had failed to keep the mine safe.

MR. FOX: Of coure, I think the view which Your Honor has taken is a little bit limited on the shift boss, on the duties of the shift boss there. Now, occasions do arise, as is well known, in mining, when a condition of affairs may exist which it is not possible for any one man to remedy, and it takes possibly the assistance of the timber men and the blasters, and so on, and under severe conditions it is necessary to inform the shift boss. But where a man is mining underground, and all he has to do is to perform the ordinary duties which are imposed upon him as a miner there, I say that the shifter, under the rule, under the customs existing there, the written rules and the customs as they exist, has no right to interfere, and if he does interfere, he interferes not as the master, but as a fellow servant. That is the distinction.

THE COURT: I may be wrong, Mr. Fox, in the construction that I have placed upon this rule, but it is a rather harsh doctrine anyway for which you contend, to say that a man who is under the control and direction of a shift boss is to take the consequences of obedience to his orders, and I am not inclined to give the doctrine place further than is reas-

onably necessary, when in the light of a rule of this kind it appears to have been the intention of the master to constitute the shift boss a vice-principal, that is, to invest him with the authority to listen to the complaints or warnings of workmen relative to this particular subject, as to the safety of the place where the miner happens to be working. Now, as I have already stated, if this man had discovered a crack in the back there, or had discovered the possibility of danger, from the sound, by using his steel, and had gone to Mr. Brown and had said to him, "I am afraid that isn't safe; what shall I do"—now suppose Mr. Brown had gone there and examined it, and said, "I think it is all right, Louis; go ahead; I am confident there is no danger here"—for a court to say that under those circumstances the plaintiff assumes the risk of following the directions of his superior, one who is apparently delegated with the authority, and exercises the discretion of, the master, in determining whether the place is safe, seems to me to be a very harsh doctrine. If the defendant had said to this man, "If you are not satisfied with the conditions, report to the superintendent, or report to some other person" and instead of doing that he had taken the word of the shift boss, or a fellow employe of the mine, then I would say that he had acted recklessly; at least he would have been bound by the rules to which he assented when he went to work. The motion will be denied. Let the jury be brought in.

MR. FOX: Your Honor will allow us an exception?

THE COURT: Yes.

(The jury thereupon returned into court.)

MR. FOX: If Your Honor please, and Gentlemen of the Jury, the defendant will prove to you the following state of facts without any question of a doubt. According to the usual custom of miners as they went down under-ground, the plaintiff in this case went to the place assigned to him, as he has already told you, and where he had worked from time to time, and he set about his labors and usual duties as a miner. Contrary to what he has testified, we will show you by witnesses who saw this ground that there was a large crack extending lengthwise, if I understand correctly, of the stope, and that there was a large overhanging boulder in about this position, as I indicate. The ground under which the plaintiff was working was lower than the opposite side. He had a buzzer machine, and was drilling in under it slightly at an angle. The crack plainly disclosed that there was a large slab there. He was drilling when the foreman, Mr. Brown, came along, and Mr. Brown told him not to work under there, but to bar that ground down, and the plaintiff then said, "Why, it is all right." He said, "If that rock comes down it is on the other side and it can't hit me". That is the language of the conversation in substance and effect. We will also show you that the timber man came there and likewise observed that ground in that condition and the plaintiff negligently working under there, and he too called the plaintiff's attention to it, and said, "What are you working under that ground

for? That is liable to come down on you." And again the plaintiff said, "It can't hurt me if it does come." We will show you that it isn't true that the shifter came in there and told him that he must not bar down. That this is contrary to the rules and instructions given him. We will further show you that, contrary to his testimony, there were bars there, that the men who had just finished those holes there in that rock were just going out as the oncoming shift, on which the plaintiff was, was going in, and that this man who was drilling there left the steel, the bars, there. I will show you that, as proof conclusive, that the bar was there. It couldn't have been disturbed or taken away between the time the last shift went out and the time the new shift came in.

When we have shown you these things, gentlemen of the jury, in connection with some testimony by a physician who made an examination here, we think we will be entitled to a verdict at your hands. I will call Mr. John Conlon.

JOHN CONLON, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Mr. Conlon, will you please give your full name?

A. John Conlon.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your business or occupation?

A. Mining.

Q. Are you working for the Federal Mining & Smelting Company?

A. I have been lately.

Q. And at the Morning mine?

A. Yes, sir.

Q. Are you still working there?

A. I am.

Q. In what capacity are you working?

A. Miner.

Q. How long have you been working as a miner in the Morning?

A. I have been working there off and on for a couple of years.

Q. Were you working there on the 8th of May, the day on which the accident occurred to the plaintiff in this case?

A. Yes, sir.

Q. Were you working on the day shift?

A. I was working on the day shift.

Q. Where were you working on the day shift?

A. On the eighth floor of the sixteen hundred.

Q. With reference to the place where the plaintiff was injured?

A. Yes.

Q. At the same place?

A. The same place.

Q. Are you the miner who drilled the holes in that piece of rock that came down, that was described by the plaintiff here?

A. Yes, I drilled them holes.

Q. Did you meet the oncoming shift as you were going out?

A. Met them at the lower station.

Q. That would be down the shaft on the sixteen hundred foot level?

A. Sixteen hundred foot level.

Q. How long was it between the time that you left the place where you had been working and the time you met these men going in?

A. I should judge about ten minutes since I left the stope.

Q. What was the condition of the place that you left it in at the time you came off shift that night?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. It was about the same as it was when I quit my drill. I barred it down the best I could before I started to drill.

Q. I mean to say with reference to the tools, what tools were there?

A. The machine was there, set up, a hammer machine, hammer drill, a pinch bar, and a pick, and some steel, there.

Q. What is a pinch bar?

A. What we use to bar down the roof.

Q. How large an instrument is that?

A. Oh, about inch and a quarter steel.

Q. How long?

A. It runs from four to eight feet, or nine feet.

Q. Just tell the jury whether or not you had made use of that pinch bar?

A. Yes.

Q. On that day?

MR. McFARLAND: We object to that as immaterial, whether he had made use of it.

THE COURT: Overruled.

A. I barred it down in the morning before I started to drill.

Q. What was the condition of the ground at the time you left it?

A. Apparently it was safe, but there was a big slab there with a crack in it that I couldn't get down with the bars. I got other fellows to help me, and we got two pinch bars, but we couldn't get it down, and I thought it might hold till we could get through, and I didn't get through drilling until the other shift came on.

Q. Did anything occur with reference to blasting just as you were going off shift?

A. They blasted close by there.

Q. I will ask you to tell the jury whether or not any powder smoke came through the stope from that blasting?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. Certainly the powder smoke come through there when they blasted.

Q. When you left was there powder smoke in the stope?

A. Yes.

Q. How large a rock was this, how large a piece was this slab that was sticking up there?

A. About four foot thick, I should judge, and about eight foot long.

Q. Which way do you mean long,—lengthwise?

A. From the foot to the hanging, across the stope, from wall to wall. She wasn't broke as far as the hanging wall goes; she was fast. I thought that would be sufficient to hold her.

Q. How big a crack was there in that?

A. You could put your hand in the crack.

Q. How long was the crack?

A. She run about five feet.

Q. And that was the piece of rock in which your drill was sticking, with the machine up, was it?

A. Yes, the same one.

Q. Now, what is the duty of a miner, under the rules and customs in that mine, when he goes into a stope like the one you had been working in, say the next shift, and sees the condition of the ground there, what is the duty of a miner that is about to do work in that place? What has he got to do?

MR. McFARLAND: We object to that, if the court please, for the reason that there appear to be printed rules here, and the rules are the best evidence of what they require.

MR. FOX: Rules and customs, if Your Honor please.

THE COURT: Do you desire to show that the rule is different from that stated by the plaintiff?

MR. FOX: No,—his duty to bar down and make the place safe, is the purpose of the evidence.

THE COURT: He has stated that. Will it be necessary to take up time in going into it further?

MR. FOX: Well, if it is admitted that that is his duty.

THE COURT: The plaintiff recognized that as being the rule.

MR. FOX: That is all. You may inquire.

CROSS EXAMINATION by
MR. McFARLAND:

Q. Mr. Conlon, had you been operating that drill, the one that the plaintiff used that evening?

A. Yes, I used it that day.

Q. And it stood where you left it that night, where you got through with the work?

A. It certainly should.

Q. Did you drill those two holes there that were already drilled?

A. I did.

Q. And you drilled that one that was partially drilled?

A. Yes, sir.

Q. Isn't it customary and usual for shots to be put into these holes before the next shift comes on?

A. No, sir, not in that mine. They blast when the night shift is going out; the eleven o'clock shift does the blasting.

Q. You mean to say that the day shift drills holes and leaves them until the night shift goes off, and then the blasters come on and they blast them?

A. That is exactly what they did.

Q. You say you noticed a crevice in this slab overhead in that place?

A. I did.

Q. Why didn't you folks call for the blasters to blast this out?

A. I didn't think it was necessary.

Q. Why?

A. Because I thought she would hold up.

Q. What made you think she would hold up?

A. I do a lot of thinking and guessing in the mine.

Q. You say there was a boulder overhead there?

A. I did not.

Q. What did you say about a boulder?

A. I didn't say anything about a boulder.

Q. Was that slab just over your machine, was it right over your head?

A. I was drilling under it.

THE COURT: Was it right over your head?

A. Certainly.

MR. McFARLAND: Q. Did you drill there after noticing that crevice in there?

A. I did.

Q. You knew when you were drilling there—

A. I wasn't going to let it come down on me, because I had a stull there to put under it if it slackened any.

Q. But if it had fallen suddenly it would have fallen on you?

A. Yes.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. How far was this blasting that occurred when you were going off?

A. About eight sets.

Q. On the same floor?

A. Yes, sir.

Q. I will ask you whether or not blasting has a tendency to loosen rock in the vicinity?

A. Certainly.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. McFARLAND:

Q. What do you mean by eight sets?

A. Five foot to the set.

Q. That would be then about forty feet away that the blasting was going on?

A. About that. I didn't count them.

Q. It wasn't a hundred feet away?

A. No, I don't think so.

Q. You didn't see the blasting yourself?

A. No, I didn't stay there.

Q. And you didn't see that slab after you left there that evening?

A. I saw it the next morning, after it was down.

Q. You don't know whether that blast had any effect on that slab, do you?

A. No, I didn't stay there.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Counsel asked you why you didn't get the blasters to blast down that rock. Just tell the jury what the fact is as to whether or not any blasters are in the mine until after twelve o'clock at night.

A. The blasters don't come on until eleven or half past eleven.

Q. And if there is any blasting to do in the daytime, who does that?

A. The miners do it themselves.

Q. You mean the machine men by miners, do you?

A. Yes, sir.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. McFARLAND:

Q. Did you call the attention of the shift boss to that slab?

A. I did.

Q. When did you do that?

A. As soon as I noticed it.

Q. How long had you been working there before you noticed that crevice?

A. As soon as I went in and looked at it, I noticed it.

Q. That was that morning?

A. Yes.

Q. And you worked there all that day while that crevice was there?

A. I didn't work there all day. I didn't start to drill there until after one o'clock.

Q. You drilled those two holes and the other one partially?

A. Yes, sir.

Q. Did the shifter come in there and examine it?

A. He didn't examine it at all. He told me to look after it, and if it wasn't safe to put a stull under it.

Q. He didn't come in and look at it?

A. He come and looked at it, yes.

Q. Did he tell you to go ahead and work there?

A. He didn't tell me anything of the kind; he told me to catch it up if I thought it wasn't safe.

Q. What did he say to you about whether you should continue to work with that crevice there?

A. He told me I was taking a chance, and if it wasn't safe I had better put a stull under it.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. How long did you bar down?

A. From eight o'clock until about half past one.

Q. And you are eight hours on shift?

A. Yes.

Q. Isn't it a fact that sometimes the miners bar down all day, without drilling any?

A. Yes.

MR. FOX: That is all.

MR. McFARLAND: That is all.

MR. FOX: Andy Berg.

ANDY BERG, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. State your full name, Mr. Berg.

A. Andy Berg.

Q. Where do you live?

A. In Mullan.

Q. Where are you working?

A. In the Morning mine.

Q. You are working in the Morning mine?

A. In the Morning mine.

Q. What are you doing in the Morning mine?

A. I am timbering.

Q. How long have you been timbering at the Morning?

A. Two years.

Q. Were you timbering there on the 8th day of May, 1915, last year, that is, the day on which the accident to the plaintiff occurred?

A. Yes.

Q. And where were you timbering?

A. I was timbering on the ninth floor.

Q. Did you at any time go by the place where he was working before he was hurt, before the slab came down?

A. Yes.

Q. How soon after you went on shift did you go by there?

A. Well, it was a long time ago; I don't remember how long.

Q. Could you give us any idea at all?

MR. McFARLAND: We object to that, if the

court please. He says it is a long time, and he doesn't remember. It would be just a guess.

MR. FOX: Q. Approximately how long?

MR. McFARLAND: The same objection.

THE COURT: Overruled.

A. Well, I think about half past five, or something.

Q. Half past five?

A. Yes.

Q. When did you go on shift?

A. Half past three.

Q. What did you go by there for?

MR. McFARLAND: We object to that as immaterial, if Your Honor please.

THE COURT: Overruled.

A. I went over there to get some nails.

Q. Were you working on the eighth floor?

A. On the ninth.

Q. On the ninth?

A. Yes.

Q. That is, you were working further over?

A. Yes, sir.

Q. Further west?

A. Yes.

Q. The ninth floor hadn't been cut through at the place where the plaintiff was working?

A. No.

Q. He was working on what would be the ninth floor when he got the stuff out?

A. Yes.

Q. When you went by there what was he doing?

A. He was drilling.

Q. Which way was he drilling, what ground was he drilling?

A. He was drilling into the back.

Q. How high was the back at that place?

A. Oh, about five feet from the muck pile.

Q. Did you notice any slab or boulder hanging on the wall in which he was drilling?

A. Yes, I noticed a big crack there.

Q. You say you could see a big crack there?

A. Yes.

Q. How long was that crack?

A. Oh, about five or six feet.

Q. How wide was it?

A. About an inch and a half, or something like that.

Q. You could stick your hand in it?

A. Yes.

Q. How high up from the top of the muck pile was this crack?

A. It is hard to tell.

Q. Could you reach it?

A. That crack?

Q. Yes.

A. Yes, you could reach it.

Q. That is, by standing on the muck pile you could reach it, could you, with a bar?

A. Oh yes.

Q. Did you have any conversation with the plaintiff at that time?

A. Yes, I was talking to him, to Louis Anderson. I said, "You are standing in a dangerous place there; you had better get away from it."

Q. What did he say?

A. Oh, "I tried to bar it down", he said, "and I couldn't get it down."

Q. Did he say anything else?

A. He says, "I am too far away from there, I stay behind."

Q. He said, "I will stay behind; I am too far away from it"?

A. Yes.

Q. I will ask you, did he say anything to you to the effect that if it came down that it couldn't catch him?

MR. McFARLAND: We object to that as leading and suggestive, if Your Honor please.

THE COURT: Sustained.

Q. What did you do then?

A. Went to where I was working.

Q. Did you go back to the place where he was after the slab had fallen?

A. Yes.

Q. Just tell the jury whether or not it was the slab about which you have been talking that came down and struck him?

A. Yes, it was the slab that was over the muck pile there that fall down on him.

Q. Is that the slab that you had been talking to him about?

A. Yes, that is the slab.

Q. How soon after you talked to him about this slab did it fall?

A. About five or ten minutes.

Q. Where was the machine after the rock had fallen?

A. Under the slab, I suppose. I didn't see the machine.

Q. Was that still standing up?

A. No.

MR. FOX: You may inquire.

CROSS EXAMINATION by

MR. McFARLAND:

Q. How long was this slab that you saw up there?

A. Well, it was about five or six feet.

Q. How wide was it?

A. The crack, you mean?

Q. No,—the slab.

A. Which way you mean,—across the top?

Q. Across the stope. You said it was five feet long. How wide was it?

THE COURT: Do you mean the crack was five feet long, or the slab?

A. The crack was five or six feet long.

MR. McFARLAND: Q. How long was the slab that fell down?

THE COURT: This witness may not understand what you mean by slab. It is possible that there wasn't any slab up there until the crack proceeded all the way around it.

MR. McFARLAND: Q. Do you know what a slab is, a slab of rock?

A. Yes, I know what it is.

Q. You saw that rock after it fell down, didn't you?

A. Yes.

Q. It was one big slab?

A. Yes.

Q. How long was that?

A. Oh, it was five or six feet.

Q. And how wide was it across?

A. Oh, I don't know how wide it was. I think it was about three or four feet.

Q. Do you know how thick it was?

A. It was around three feet thick, I think.

Q. You say you saw a crack in that slab?

A. Yes.

Q. Which way did that crack run?

A. Well, the crack was facing the east.

Q. Did the crack run across this slab, through the slab?

THE COURT: The crack in the slab, you say?

MR. McFARLAND: I am asking him that to see, Your Honor.

A. The crack was in the back, you see.

MR. McFARLAND: Q. What were you doing when you went there to where Louis Anderson was working?

A. I went over there to get some nails.

Q. Did he have any nails?

A. No, the nails was over the timber there.

Q. How far was that from where his machine was?

A. The nails was?

Q. Yes.

A. Oh, that was about twenty-five feet.

Q. Do you know how long Anderson had been running his machine before you went there?

A. No, I don't know.

Q. You don't know whether he had just started it up, do you?

A. No, I don't know when he started, but he was drilling when I passed through there.

Q. He was drilling when you passed there?

A. Yes, sir.

Q. Did he stop drilling to talk to you?

A. Yes.

Q. He stopped the drill, did he?

A. Yes.

Q. And then about ten minutes afterwards you heard this slab fall, didn't you?

A. No, I didn't hear it fall.

Q. You learned that it fell? About ten minutes after that, you found that the slab fell?

A. Yes. The shift boss was hollering to me, said a man was buried up in the muck.

Q. Was there anyone there when you were talking to Louis Anderson?

A. No.

Q. Was there anyone in sight?

A. No.

Q. Was this slab just right straight up above him and above the machine?

A. It was up above the machine.

Q. Right straight up above the machine?

A. Yes, sir.

Q. And he stood alongside of the machine, did he?

A. Yes.

Q. How wide did you say this crevice or crack was?

A. About an inch and a half.

Q. About an inch and a half?

A. Yes.

Q. Did he tell you that he had been trying to bar that down?

A. Yes.

Q. Did you see any bars around there at that time?

A. No, I didn't look for any bars.

Q. Did you see any there?

A. No, I didn't see any bars.

MR. McFARLAND: That is all.

MR. FOX: That is all.

JOHN C. BROWN, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. What is your name, Mr. Brown?

A. John C. Brown.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your business or occupation?

A. Miner or shift boss.

Q. Are you now working for the Morning mine, at the Morning mine, for the Federal?

A. Yes, sir.

Q. How long have you worked there as a shift boss?

A. About three years and a half.

Q. Were you working there on the shift on the eighth day of May, on which the plaintiff was injured?

A. Yes, sir.

Q. What was you doing then,—shifting?

A. Shifting.

Q. What shift did you have,—the afternoon shift or the morning?

A. The afternoon.

Q. What time did you go underground with the shift?

A. We started in at half past three.

Q. How many men have you under you?

A. Oh, thirty-five or forty.

Q. You had the sixteen hundred level, did you?

A. Yes, sir.

Q. Any other level?

A. Eighteen.

Q. Eighteen and sixteen?

A. Yes.

Q. How far are those two levels apart?

A. Two hundred feet.

Q. And the stoping occurs between the two levels, for instance, from the eighteen hundred to the sixteen hundred there are a great number of stopes, floors. How many floors between the levels?

A. Twenty-two.

Q. And then from sixteen to the fourteen hundred is two hundred floors, or twenty-two floors, in which stoping goes on?

A. Yes, sir.

Q. And your men on the sixteen hundred were working on the seventh and eighth floors, is that correct?

A. At that particular place, seventh, eighth and ninth.

Q. At the place the plaintiff was injured the ninth floor hadn't been cut yet?

A. No.

Q. He was working on the eighth floor, on what is known as the second cut, is that correct?

A. Yes, sir.

Q. How high was the muck pile at that place, as near as you can remember?

A. Probably eight feet.

Q. How far was it from the top of the muck pile to the back or roof?

A. About five feet.

Q. Just how soon after you went on shift did you go to the place where the plaintiff was working?

A. About an hour and three-quarters.

Q. After he started to work?

A. Yes, sir.

Q. What were you doing in the meantime?

A. Going through the other level.

Q. How far are these men that are working for you apart?

A. Oh, that varies.

Q. Well, on this particular shift.

A. They are scattered all over both levels.

Q. And in order to get to them you go down the

shaft say from sixten to the eighteen, if you want to get to the men on the eighteen you take the cage down, and go down in to the eighteen, and then walk up to the floors where the men are?

A. Yes, sir.

Q. In other words, you can't be there all the time to supervise all the work?

MR. McFARLAND: We object to that as leading and suggestive, if the court please.

MR. FOX: Q. Just state what the fact is Mr. Brown, as to whether or not it is possible for you to be at the different places where the men are at work under you to supervise and direct the work continuously?

MR. McFARLAND: We object to that, if Your Honor please, because it stands to reason that he can't be in more than one place at one time.

THE COURT: Let him answer. The answer wont hurt you any.

WITNESS: Read the question then.

THE COURT: Oh, you can't be in several places at the same time?

A. No.

MR. FOX: Q. How often do you make the rounds on your shift?

A. Two and three times a shift.

Q. Now, when you went to the place where the plaintiff was working, what, if anything, did you observe?

A. I observed bad ground over where he was working.

Q. Just describe that ground a little bit more in detail to the jury.

A. There was a crack in the back of the stope where he was working.

Q. How high above the place where he was working?

A. Probably six or seven feet.

Q. And how long was this crack?

A. Four or five feet long.

Q. Just in your own way describe the position of that crack with reference to the walls or the back, the contour of the crack.

A. One side of the stope was considerably higher than the other, that is, the foot wall side was blasted out higher than the hanging wall, and this slab run from the hanging wall up like that (indicating), and there was a crack coming in over it. It was very thin on this edge, but it run back and got thicker at the back end.

Q. And where was the plaintiff working with reference to this slab?

A. He was standing down under here, next to the wall.

THE COURT: Next to the foot wall, you mean?

A. Next to the hanging wall.

MR. FOX: Q. Which way was he drilling?

A. He had his machine pointed up into the back end of the slab.

Q. What, if anything, did you tell him, or what, if any, conversation did you have with him at that time?

A. I says, "What are you doing under there"? He says, "I am drilling". I says, "That is bad ground over you." He says, "Well, I tried to get it down but I couldn't." I says, "Well, that don't look good to work under."

Q. What did he say?

A. I told him that that didn't look good to work under, and he says, "I am away back next to the wall, out of the road, if it does come down." I says, "Well, it don't look good to me," and he says, "Well, if it falls it wont touch me anyway." So I passed on.

Q. How long had he been working for you?

A. I think he had worked about a year.

Q. And how long had he been working in that particular stope there?

A. He worked there three or four months.

Q. Now just tell the jury as to whether or not you considered him a good miner?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. I did.

MR. FOX: Q. Just tell the jury what the fact is as to whether or not the shifter must rely upon the judgment of the men who are working under ground as to whether or not it is safe.

MR. McFARLAND: If Your Honor please, we object to that as incompetent, irrelevant, and immaterial, and calling for the opinion and conclusion of the witness, and usurping the functions of the jury and the court.

MR. FOX: He is an expert miner, if Your Honor please.

THE COURT: I think I shall sustain the objection to the question in this form. It is possible that what you are seeking to elicit is material and pertinent, but the question, as you ask it at least, is objectionable.

MR. FOX: Q. When you went by there, Mr. Brown, and had this conversation with the plaintiff, and the plaintiff told you that in his judgment it was safe, or words to that effect, and you knew he was an experienced miner, just tell the jury what the fact is as to whether or not you relied upon his judgment in reference to the condition and character of the rock?

MR. McFARLAND: We object to that for the same reasons contained in our last objection, and for the further reason that this witness has testified that notwithstanding that the plaintiff said that he was too far back or could get out of the way, he told him, "Well, it doesn't look good to me," manifesting and showing, in other words, that he, the witness, knew that that was dangerous ground. He just stated to the plaintiff that it was, and then after they had this talk the last word he said to the plaintiff was, "It doesn't look good to me". And then this question tends to elicit a contradictory answer.

MR. FOX: Not at all. Not at all. If Your Honor please, the question is right here: Here is a miner who has been working for an hour or so underground, and the shift boss comes along and says,

"This isn't good ground," and the miner says, after working here for an hour and a half, "It is all right as far as I can see, and if it does come it wont hurt me", and the shifter has a right to rely upon a man of experience.

THE COURT: Well, you can argue that to the jury. It is unnecessary to ask the question of the witness.

MR. FOX: Very well.

Q. Now, Mr. Brown, what is the fact as to whether or not bars are furnished to the miners for the purpose of barring down ground?

A. Yes, sir.

MR. McFARLAND: Wait a minute. If the court please, I object to that unless it can be shown that on this particular occasion,—Your Honor can see—

THE COURT: Just make your objection.

MR. McFARLAND: I object that it is incompetent, irrelevant and immaterial.

MR. FOX: Q. Upon this day were bars furnished to the miners on the sixteen hundred foot level, and on the sixth floor?

THE COURT: If he knows. If you know you may answer, and if not, say so.

A. Yes, sir.

Q. What did these bars consist of, what kind of bars were they?

A. Made out of inch and a quarter or inch and an eighth steel.

Q. How long are they?

A. They vary in length from four to eight or nine feet long.

Q. I will ask you, Mr. Brown, did you or did you not observe any bars at the place where the plaintiff was working on that day?

A. I did.

Q. What was there in the nature of a bar or bars?

A. Well, there was a pinch bar about seven feet in length on the muck pile when I passed over.

Q. Did you go back to the place where the plaintiff was injured after that?

A. After the accident?

Q. Yes.

A. Yes, sir.

Q. How soon after this conversation that you had with him did the accident occur?

A. About ten minutes, probably.

Q. I will ask you to tell the jury, Mr. Brown, whether or not you had any conversation or in the conversation which you had stated to the plaintiff that he shouldn't be doing what he was doing, but should go to work and drill in that rock, that is, that he should stop trying to make the place safe,—did you have any such conversation with him?

A No, sir.

Q. Did you hear the vile language that the plaintiff used upon the stand, that he laid to you?

A. Yes.

Q. Did you use that language towards him?

A No, sir.

Q. When you first went into the place where the plaintiff was working, I will ask you to tell the jury

whether or not the plaintiff was engaged in drilling or engaged in making the place safe, or testing the place?

A. He was drilling.

Q. Could you tell the jury how far he had drilled into the hole, do you recall that?

A No, sir.

Q. In what position was he,—standing or sitting?

A. Standing.

Q. Just tell the jury what the fact is as to whether or not timber is furnished in the stopes to put in sprags?

MR. McFARLAND: We object to that as immaterial and not pertinent to any of the issues in the case.

THE COURT: Sustained.

MR. FOX: I think you may inquire.

CROSS EXAMINATION by
MR. McFARLAND:

Q. How long after you had this conversation with the plaintiff before this slab fell?

A. In the neighborhood of ten minutes.

Q. You hadn't any more than left him, had you?

A. I had gone a hundred feet or a little better.

Q. Now, you saw that crevice plainly, did you?

A. Yes, sir.

Q. And it was a dangerous place, wasn't it?

A. It looked dangerous.

Q. You considered it dangerous?

A. I did at sight, yes.

Q. You had been a miner yourself, hadn't you?

A. Yes, sir.

Q. You had been a miner how long up to that time?

A. About twenty-six years.

Q. And any one could have seen that crevice as well as you could?

A. Yes, sir.

Q. And you told him it didn't look good to you?

A. Yes, sir.

Q. You told him that several times.

A. Twice.

Q. He told you that he was too far back to get hurt, did he?

A. He told me he had tried to bar it down, and anyway he was too far back, out of the road.

Q. But he was right under the slab all that time, wasn't he?

A. Not directly under.

Q. He had to keep hold of this machine while he was operating it?

A. Yes, sir.

Q. And the machine was right under the slab, wasn't it?

A. Under the back part of it.

Q. When the slab fell it fell on the machine and buried the machine, didn't it?

A. Yes, sir.

Q. Didn't it occur to you there, Mr. Brown, that if that slab fell it must necessarily fall upon the plaintiff?

A. Yes, sir.

Q. Why didn't you take some precaution to prop up that slab or crib it up, to make that place safe?

A. Because he told me he had examined it and was satisfied that it was safe.

Q. But you knew as well as he did that it wasn't safe, didn't you?

A. I would probably have known if I had took the time to examine it that he did.

Q. Wasn't it part of your duties to protect the workmen against such dangers as that?

A. To make them protect themselves.

Q. You didn't order any one to put a stull under that slab, did you?

A No, sir.

Q. Or to crib it up in any way?

A. No, sir.

Q. And you didn't suggest to him to put a stull under it, did you?

A. No, sir.

Q. Or to crib it up?

A. No, sir.

Q. You say you know that bars were furnished to the men that afternoon?

A. Yes, sir.

Q. How do you know?

A. Because he told me he had been barring down, and I noticed the bar laying there.

Q. Didn't he tell you that he was trying to bar down with the drill?

A. No, sir.

Q. And didn't he tell you that he couldn't find any bar?

A. No, sir.

Q. And wasn't he feeling that back or roof with his hand when you came in there?

A. No, sir.

Q. You say you didn't use that language that he attributes to you?

A. No, sir.

Q. Isn't it a fact that you commonly, oftentimes use just such language as that to men?

A. No, sir.

Q. How did you get this rock off of him after this accident occurred?

A. The men helped me.

Q. Did you use any tools or instruments?

A. No, sir.

Q. Didn't you use any bars?

A. No, sir.

Q. Didn't it become necessary to put bars under that rock to lift it up?

A. No, sir.

Q. How did you get it off of him?

A. The rock that was on him we rolled off with our hands.

Q. How about the smaller particles of rock that was on him?

A. We rolled those off by hand.

Q. You know this man Tom who testified for the plaintiff today, don't you?

A. Yes.

Q. Didn't you see him looking for a bar around there?

A. No, sir.

Q. Who provides these different crews with bars? Who does that?

A. They have a nipper.

Q. When does he distribute these instruments, the drills and bars, and things for the men to work with?

A. They are distributed every day.

Q. Isn't it a fact that when a shift goes off of work the nipper gathers up the tools and takes them to the blacksmith shop and has them sharpened, and then is supposed to return them, or others in their place?

A. The dull ones, yes.

Q. You don't know whether the nipper had done this in this case, at this particular time, or not, do you?

A. No, sir.

Q. How long did you say he had been at work before you went to him and had this conversation?

A. Between an hour and a half and an hour and three quarters.

Q. How do you know that? How do you fix the time?

A. The time he was supposed to get to work.

Q. You are just guessing at it, are you not?

A. Yes, sir.

Q. From the time he was supposed to go on duty?

A. Yes, sir.

Q. But you don't know how much time he spent in looking up tools, do you?

A. No, sir.

Q. You don't know how much time he spent in examining that back or roof, do you?

A. No, sir.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. You mean from the time he went down to his level to the time you came to his place of work consumed an hour and a half, is that it?

A. Yes, sir.

Q. Counsel asked you whether you put up any stull or directed him to put up any stull, and you said no. Why did you not direct him to put up a stull there?

MR. McFARLAND: We object to that, if Your Honor please, as irrelevant, incompetent and immaterial, and calling for the opinion and conclusion and state of mind of this witness.

THE COURT: Overruled.

MR. FOX: Q. Why didn't you put a stull there, or direct him to put a stull there?

A. He satisfied me that it was safe.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. McFARLAND:

Q. So he satisfied you finally that it was safe, did he?

A. Yes, after telling me that—

Q. Why did you say to him as your last parting words that it didn't look good to you?

A. Because it didn't look good.

Q. And it did not look good, did it, any time?

A. No, sir.

Q. Now, when you were there having this talk with Louis, did you see Andy Berg?

A. No, sir.

Q. He wasn't there?

A. No, sir.

Q. He wasn't in sight, was he?

A. No, sir.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Mr. Brown, something has been said in reference to a nipper. What are the nipper's duties?

A. To pick up the dull steel and picks and bars and take them out.

Q. When are the bars brought into the stopes?

A. They come back when the shift comes on.

Q. When are the bars taken out? Under what circumstances are the bars taken out?

A. Only when they are dull or broken.

Q. And there is a nipper on each shift, is there?

A. Yes, sir.

MR. FOX: That is all.

MR. McFARLAND: That is all.

MR. FOX: Mr. Conlon will take the stand again just for a moment.

JOHN CONLON, a witness heretofore duly sworn

on behalf of defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Mr. Conlon, after the accident to the plaintiff did you go back to work in the same place?

A. The following day I did.

Q. That would be the next morning shift?

A. The next morning.

Q. What was the condition of the place at the time you went on shift again?

MR. McFARLAND: We object to that as irrelevant, incompetent and immaterial, and too remote. There might have been all kinds of changes made.

THE COURT: Read the question.

(Last question read.)

THE COURT: Sustained.

MR. FOX: Did you at that time find a bar which you had used on the day before?

MR. McFARLAND: I object to that, if the Court please, as irrelevant, immaterial and incompetent, for the reason that the bar might have been taken away and taken back there.

MR. FOX: I think under the conditions it couldn't have been, counsel, if you will allow the question.

THE COURT: I can't see why it couldn't have been, Mr. Fox.

MR. FOX: There is a very good reason, if Your Honor please. The bar was buried under this stuff that came down.

THE COURT: You haven't shown that.

MR. FOX: I desire to show it by this witness.

Q. Where was this bar that you had used the day previous?

A. The following morning when I went to work?

Q. Yes.

A. It was under that boulder that came down.

Q. What was the condition of it at that time?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. The bar was doubled up.

MR. FOX: You may inquire.

CROSS EXAMINATION by
MR. McFARLAND:

Q. Now, were you there when they took this rock off of the plaintiff?

A. No, sir.

Q. You don't know whether that bar had been taken there for that purpose or not, do you?

A. I think it would be an impossibility, for I don't think they touched the boulder after the man was taken out that night.

Q. You know it was lifted off of him?

A. No, it couldn't have been. The big one wasn't on him.

Q. Did the boulder lay in the same place that it fell?

A. Yes.

Q. Then it wasn't moved after it fell there until you saw it the next morning?

A. No, it couldn't be moved.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:'

Q. How many pieces had that boulder been broken into, the piece that fell off?

A. They used the jack hammer on it afterwards, the small machine, and blasted it.

Q. Did it break into one piece?

A. There was a couple of small pieces.

Q. You are not referring to the piece that hit him, when you refer to the piece that was lying on the—

MR. McFARLAND: We object to that as leading and suggestive, if Your Honor please.

MR. FOX: It can be made clear.

THE COURT: I think that has been explained.

MR. FOX: Very well. That is all then.

I will call Doctor Eikenbary.

C. F. EIKENBARY, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Will you state your name, Doctor?

A. C. F. Eikenbary.

Q. Where do you reside?

A. Spokane.

Q. You are a physician and surgeon, are you not, Doctor?

A. Yes.

Q. Where were you educated?

A. In Rush Medical College, in Chicago, and the

Hospital for Ruptures and Cripples in New York, and the Home for Crippled Children, in Chicago.

Q. How long were you in this hospital for the ruptured and crippled?

A. About a year and a half.

Q. And subsequent to that time where did you go?

A. I was in school before that time, and then after that I moved back to Chicago, and was one of the attending surgeons for the Home for Crippled Children.

Q. How long were you attending physician and surgeon for that home?

A. Until I left Chicago to come here,—about three years.

Q. And then you came to Spokane, did you?

A. Came there in 1907.

Q. And you have been there ever since?

A. Yes, sir.

Q. Have you specialized in anything?

A. My work is surgery, bone troubles, joint troubles, and deformities.

Q. Deformities which are the result of accident as well as birth?

A. Yes, sir.

Q. Doctor, have you made any examination of the plaintiff in this case, to determine the nature and extent of the injuries, if any, from which he is now suffering?

A. I made an examination yesterday morning, yes, sir.

Q. Where did you make that examination?

A. In the hospital.

Q. Who was present?

A. Dr. Worthington and an interpreter.

Q. And the plaintiff?

A. The plaintiff, yes, sir.

Q. Did you talk to the plaintiff in the English language, or did you—

A. I talked mostly through an interpreter, practically entirely through the interpreter.

Q. What did this examination consist of, Doctor?

A. Well, it consisted chiefly in just a physical examination, without any very great regard to the history of the case, because the history was rather hard to obtain. I examined his spine a swell as I could, and examined his ankle, of which he complained, and the shoulder; and also made a rather superficial examination of a tumor mass in the abdominal wall, which he called my attèntion to; and tested his reflexes.

Q. Referring to the tumor mass, Doctor, could that be the result of an injury to the shoulders and back and head?

A. I wouldn't think so.

Q. What, if any, condition did you find in reference to his ankle?

A. He complained of pain when the ankle is moved, although he himself can move it backwards and forwards to practically the normal range of motion. When he attempts to pull the ankle up in this direction (illustrating) as far as possible, it

doesn't come quite in the normal position. He can turn it down as far as normal, and it is possible to move it passively, that is, take your hand and move it to the normal position. He complained of it, when it was done, that it produced some pain.

Q. Were you able to discover any injury or any condition of that foot which might be the result of an injury by a rock falling upon it?

A. Well, there isn't anything to be found by the examination. He says he has pain, but there is nothing in the movement of the foot that would necessarily indicate an injury, no.

Q. Nothing that would indicate an injury to the bones or ligaments or muscles of the foot?

A. Nothing that would necessarily indicate an injury, no.

Q. I understand you then, Doctor, that the only thing that throws any light on it at all, with reference to whether or not he had an injury there, was the fact that he complained of pain?

MR. McFARLAND: We object to that, if the Court please, as leading and suggestive.

MR. FOX: This is an expert witness. I think I have a right to ask it.

THE COURT: Sustained.

MR. FOX: Q. Doctor, did you then examine the arm of which he complained?

A. I did, yes.

Q. What did you find there?

A. There is a limitation to the movement of the arm when you attempt to get it to what is known as

the extreme abduction, that is, elevating the arm to the extreme limit. He can move it forward to the normal range, and backward to the normal range, but when you attempt to move it up it doesn't go quite as high as it does on the other side. Apparently he was not able to put the arm up as high on the right side as he was on the left, but the movements aside from that were normal, unless possibly there was a slight limitation to the rotation of the joint. When you attempt to rotate it this way (illustrating), there is a very slight—

Q. Is there such a limitation of the motion of the arm as would incapacitate the plaintiff from performing the ordinary manual labor, such as is done in mines?

MR. McFARLAND: We object to that, because the witness hasn't qualified to answer the question. He hasn't shown that he knows what is required of a miner in a mine.

THE COURT: Overruled.

A. So far as the motion goes, it would not incapacitate him, not unless it is a question of pain.

Q. Is that same thing true in reference to his foot?

A. So far as the motion is concerned, it wouldn't incapacitate him.

Q. Now, Doctor, did you make a test to determine whether or not there was any injury in that arm to any of the nerves of the arm?

A. I did. I tested the sensation in the skin, which is best done by using a very small wisp of cotton,

something exceedingly soft, that would be felt very, very slightly. Over the outer side of his arm about the middle there was an area which ordinarily he didn't feel when I would brush the cotton over it, but it wasn't a perfectly definite area; that is, sometimes he would not feel it here, and then next time it would be a little higher where he wouldn't feel it. Down in the hand he complained of a loss of sensation in the thumb, the back of the thumb and the back of the index finger, and, testing with a piece of cotton by just barely touching it, apparently there was very little sensation, if any, in that particular region. But the sensation over the middle finger was normal, and the sensation over this finger (illustrating) is normal, over the ring finger is normal.

Q. How about the fourth finger and the little finger?

A. You mean the ring finger and the little finger?

Q. Yes.

A. They were normal.

Q. You say he complained of a loss of sensation in the thumb and in the index finger?

A. In the back of the thumb and the index finger, yes, the back of the thumb and the back of the index finger.

Q. What nerve supplies the back of the thumb and the back of the index finger?

A. The radial nerve.

Q. Does the radial nerve supply any other fingers excepting the thumb and the index finger?

A. The radial nerve supplies the back of the

thumb, the back of the index finger, the middle finger and half of the back of the ring finger. In other words, it supplies this

Q. If there is an injury to the nerve supplying the top of the thumb, the index finger, the middle finger, and half of the ring finger, that is, the radial nerve, what is the fact, Doctor, as to whether or not the loss of sensation will be uniform in those fingers which that nerve supplies?

A. It would necessarily be uniform at those fingers, the three fingers and a half.

Q. What is your deduction then when you find that the plaintiff in this case claims to have a loss of sensation of the thumb and the index finger, but not a loss of sensation of the middle finger, or of that half of the ring finger supplied by the radial nerve?

A. I think the kind of deduction I would make was that he didn't understand what I wanted him to do. That is, I wanted him to say yes when I touched him, and he possibly felt it and didn't understand.

MR. McFARLAND: We object to that, if the Court please, and ask to have it stricken out. It is simply an opinion of the witness as to the mental condition of the plaintiff at that time, and as to what he thought he meant, without his knowing.

THE COURT: Sustained:

MR. FOX: Q. Doctor, what I am trying to get at is, from your examination of this plaintiff, bearing in mind the test which you made upon his fingers to determine whether or not there was anything the

matter with the nerve supplying the fingers, did you come to a conclusion as to whether or not there existed in the plaintiff an injury to the nerve?

A. I should say there is no injury to the radial nerve.

Q. Is there any injury that you were able to find to any of the nerves supplying the arm, the upper arm and the forearm, and the hand?

A. No.

Q. Now with reference to the spot on his upper arm where he claimed anesthesia, what have you got to say as to that?

A. I have already explained that the area of anesthesia was not definite.

Q. What do you mean by not definite?

A. I mean that one time when I would go over it, the area of anesthesia would be higher than at another; that is, he would feel it one time here (indicating), and the next time he wouldn't feel it there. So that if he felt it once the deduction would necessarily be that the nerve is able to functionate, otherwise he wouldn't be able to feel it at all.

Q. If there is a disorder of the nerve the loss of sensation should be definite and the same continuously?

A. Yes, it would be.

Q. And it was your deduction from that, Doctor, or what was your deduction from that as to whether or not there was an injury to the nerve supplying that portion of the arm in which he claimed this anesthesia?

A. I should say there was no injury to the nerve itself.

Q. Doctor, did you inquire as to whether or not the plaintiff had at any time suffered from any disease?

A. I did, yes.

Q. I am referring particularly as to whether or not he suffered from any venereal disease.

MR. McFARLAND: I object to that as irrelevant, incompetent, and immaterial, and not pertinent to any of the issues, if Your Honor please.

MR. FOX: It is only preliminary.

THE COURT: Objection sustained.

MR. FOX: If Your Honor please, it can be shown medically that the condition of which the plaintiff complains at the present time may be the result of such a disease.

THE COURT: That question isn't before the court. It is a question of whether or not you are showing it in a competent way.

MR. FOX: Q. I will ask you, did you inquire of him as to whether or not he had been afflicted with a disease known as gonorrhea?

MR. McFARLAND: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Overruled. Answer yes or no.

A. Yes.

MR. FOX: Q. What did he say as to whether or not he had been afflicted with such a disease?

MR. McFARLAND: We make the same objection, if the Court please.

THE COURT: Overruled:

A. He said he had.

MR. FOX: Q. Doctor, can you account for the pain which he claims to have in his heel upon the ground or by reason of the fact that he has suffered with that disease?

A. The pain which he has, which he complains of having under the heel, is a pain that is usually caused by bony spurs, bony outgrowths, and little sharp pointed spurs, growing out at that point, and is the remote effect of gonorrhea, is the remote effect of infection. Just why it occurs there is hard to explain, but it is common for that to happen. That pain he has there would be the reasonable way to account for that.

Q. Doctor, I will ask you whether or not a limitation of the arm, of the motion of the arm, which you found in the plaintiff, can be accounted for upon the same principle?

A. It would be possible, yes. Any inflammation of the joint would limit the motion in the joint, and any joint may be inflamed as a result of infection of that kind, or any other infection.

Q. Is that a common thing?

A. It is exceedingly common.

Q. To find a limitation of the arm?

A. It is not quite as common in the arm as it is in the knee. But it occurs in every joint.

Q. Every joint?

A. Yes.

MR. FOX: You may inquire.

CROSS EXAMINATION by
MR. McFARLAND:

Q. How did you ask him if he had been afflicted with gonorrhea?

A. Through the interpreter.

Q. How did you state your question?

A. I stated it in two or three different ways before I finally made him understand.

Q. Give the different ways.

A. I asked him if he had had gonorrhea, and then I asked him if he had had clap.

Q. What did you say when you asked him if he had had gonorrhea?

A. I don't think the interpreter understood me.

Q. Do you think the interpreter understood you when you asked him if he had had clap?

A. Yes, I think he did.

Q. The only evidence that you had that indicated that he had any of these troubles was the answers you received through the interpreter?

A. Yes.

Q. If he had denied having had those diseases or troubles there was nothing appeared from his person or from a physical examination showing that, was there?

A. Yes, there was.

Q. What was there?

A. The pain in the bottom of the heel. That was why I asked the question.

Q. Wouldn't that be the result of an injury just as well as this other?

A. It is so uniformly the result of gonorrheal infection—

Q. Never mind. Couldn't that be the result of a rock falling on his foot?

A. Yes, if it fell on the center of his heel it might cause it.

Q. Couldn't a rock fall on his instep or the bridge of his foot and cause the injury?

A. No.

Q. Why not?

A. Because it is the result of an outgrowth of bone on the bottom surface of the heel bone.

Q. Did you observe any puffiness in or about the heel?

A. No, there wouldn't be any.

Q. Was that right heel just the same as his left, as far as appearances were concerned?

A. I don't remember, but it undoubtedly would have been.

Q. You have testified about some disability of his right arm and shoulder. Could you tell how long that existed?

A. No, I could not.

Q. If he sustained the accident which he claims to have sustained, on the 8th day of May, and up to that time he had been a well man, would you attribute the condition to gonorrhea or syphilis or clap?

A. No; I would attribute his condition to the injury.

Q. To the injury?

A. Yes.

Q. How long after the inception of a disease of that kind would these evidences appear, these symptoms?

A. They may be any length of time; any old infection can produce at any time joint disturbances.

Q. Is gonorrhea a separate and distinct disease?

A. Yes.

Q. Doesn't that originate in what is commonly called clap?

A. It is simply different terms for the same disease.

Q. Isn't it an older stage, or an aggravated stage, of what is called clap?

A. No; they are one and the same.

Q. You don't mean the jury to understand you as saying that his difficulties or disabilities are due to—

A. No, I didn't say that at all. I said I thought possibly the pain he had on the under side of his heel might be due to that.

Q. And at the same time it might be due to that injury he complained of?

A. I don't think so.

Q. How about this tumor of the stomach?

A. He has a mass which is nodular, about the size of a—I should say probably the size of a hickory nut, with little outgrowths from it, which is not in the abdominal cavity, but in the abdominal wall, which can be rather easily felt in feeling over the abdominal wall.

Q. Did he claim any pain when you manipulated that?

A. Yes, he said there was some pain.

Q. Did you examine his back or spine?

A. Yes.

Q. Did you discover any disability there?

A. He claimed that he had some pain, but he was able to stand, standing straight and keeping his knees perfectly straight, to bend and touch his hands to the floor, which I took it would eliminate any injury to the spine.

Q. Did he state whether or not going through those exercises gave him any pain?

A. He said it gave him pain.

Q. Isn't it possible for him to have been injured in the back or spine and go through those exercises, stoop over and go to the floor?

MR. FOX: It isn't a question of possibility.

THE COURT: Answer the question.

(Last question read.)

A. I wouldn't say it was not possible.

Q. Did you examine his ear?

A. His ear?

Q. Yes.

A. No, I didn't. I had no way of examining his ear, and I merely judged of his hearing by the ordinary conversation, by him being able to apparently hear the ordinary conversation.

Q. You didn't make any inspection of his ear?

A. No, sir.

Q. Did you examine his head for any depression?

A. We did, yes.

Q. Did you find any?

A. Well, there is, over the back of his head there is a region there that you might say was a little depressed. I wouldn't call it a depression, because these little variations occur in practically everybody.

Q. You couldn't tell whether it was a depression or whether it was a natural indenture of the skull?

A. No, sir.

Q. If it is a depression it is liable to result seriously, isn't it?

A. That would depend entirely upon what follows beneath it, whether it had pressed upon the brain or not.

Q. Did you examine the side of his head in the region of his temples?

A. No, I did not.

Q. You didn't make any examination to ascertain whether or not there was any numbness there, or any lack of feeling?

A. Not in that particular spot, no.

Q. Now, would you say that his right arm and shoulder is as good as it ever was?

A. No, I wouldn't say so.

Q. He wont be able to use it as well as he could prior to this injury or this accident, if the accident injured him in that way?

A. You say would he be able to use it as well?

Q. Yes, will he hereafter?

A. It will depend entirely upon the amount of recovery that takes place.

Q. Assuming that he was injured in his arm and shoulder on the 8th day of May, wouldn't it be about

time, if he was treated every ten days, for that shoulder and arm to show some improvement?

A. Why, I don't think it is up to me to pass on the treatment a man has had.

Q. You recognize the treatment of those kind of injuries by electricity, do you not?

A. Not to any very great extent, no.

Q. Would that be a proper treatment?

A. It might be a proper treatment if the doctor thought there was some injury to the nerve itself, that might be all right.

Q. Are you acquainted with Doctor Mowry of Wallace?

A. Yes, sir.

Q. Is he a competent physician?

MR. FOX: I object to that as incompetent, irrelevant and immaterial, and not proper cross examination.

THE COURT: Sustained.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Doctor, counsel asked you as to whether or not, if the depression in the skull were the result of an injury, it would be serious, and you said it would be if the evidence afterwards showed that there had been a pressure on the brain.

A. I said it would depend entirely on whether or not the depression was carried clear through into the brain itself.

Q. Is there any evidence in this man that the depression has been carried through?

A. None that I found, no.

Q. Is there any evidence that he is suffering by reason of an injury to the top of his head which might have caused that depression?

A. I don't think there is any evidence, no.

Q. Doctor, you say that you didn't examine the side of the face?

A. No.

Q. Why didn't you?

A. My attention wasn't called to any numbness or any trouble at that point. The only thing on the side of the face at all was the hearing, the ear, the question of his hearing.

Q. He didn't complain of anything?

A. No.

Q. Is it possible, Doctor, to state mathematically the amount of limitation there is in that right arm that you discovered?

A. Yes, it is possible, only of course your mathematics is not as exact as you would like to have it.

Q. Could you state it mathematically, so that we may know just—

A. I should say that he had a normal range of motion in extension forward, and the backward movement of the arm, I should say that was normal, and the extension in this direction (illustrating) is normal, but the extension upwards is not quite normal.

Q. How far below the normal would you say that was there?

A. Well, I could probably state it better by say-

ing that he has, in extension he probably has seventy-five per cent of the normal range of motion; that probably would be as near stating it mathematically as you could get.

Q. Doctor, you also stated in answer to a question propounded by counsel that it might be possible that he could stoop over and touch the floor with his hands, stooping, and yet have sustained the severe injury to his back. Would it be probable?

A. It would be very improbable.

MR. McFARLAND: We object to that, if the court please.

THE COURT: Overruled.

MR. FOX: Q. You say it would be very improbable?

A. I should say it would be very improbable.

Q. Is there any evidence in this man of a permanent injury to the spine or back?

A. I don't see any, no sir.

Q. Doctor, I will ask you to state to the jury, based upon your examination and experience, as to whether or not, in your judgment, this man is incapacitated from performing manual labor?

MR. McFARLAND: We object to that as incompetent, immaterial and irrelevant, if the Court please, and because the witness hasn't qualified himself to answer that particular question, it is a matter of conjecture.

MR. FOX: It is the usual question, if Your Honor please.

THE COURT: Objection sustained.

MR. FOX: An exception. That is all, Doctor.

RE-CROSS EXAMINATION by
MR. McFARLAND:

Q. Doctor, if the plaintiff had suffered a depression of the skull, which caused a pressure on the brain, wouldn't that produce this numbness and lack of feeling that he complains of?

A. In his fingers?

Q. Yes.

A. No.

Q. Wouldn't it in his arm?

A. It might produce a numbness, but it would have to be a definite numbness.

Q. It would produce some lack of feeling, wouldn't it?

A. It might.

Q. That might result finally in total paralysis of one side?

A. No, not likely, in that region.

Q. Well, it is possible, is it not?

MR. FOX: I object to the possibilities. It is the probabilities.

THE COURT: Overruled.

A. No, I should say that in that region it was not possible.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Doctor, a depression of the skull at the place where you found this little depression there, if that depression were caused by an injury, as I under-

stand you to say, it would not produce the numbness of which he complains? It would not produce the numbness of which he complains in the upper region of the arm and in the fingers?

A. It would not, no.

MR. FOX: That is all.

MR. McFARLAND: That is all.

THE COURT: Doctor, there is one question I want to ask you. You stated that a certain injury would not benumb one finger of the hand unless it benumbed others or reduced the degree of sensation. You mean it would be impossible for one finger to be without sensation and another to have it?

A. It would be impossible for one finger to be without sensation, that is, it would be impossible for the back of the thumb, for instance, to be without sensation as a result of an injury to the radial nerve, without also the index finger, the middle finger, and half of the ring finger also being without sensation.

Q. Suppose a man were injured by having heavy stones fall on him, would it be pssible for him to be injured in such a way that one finger, that is, say the thumb, is without sensation, and the index finger or first finger still has sensation?

A. It would be possible if the injury were down here in the thumb; it would have to be down here. It couldn't be up here (indicating).

Q. In other words, it would have to be to the nerve that supplies the thumb and the thumb alone?

A. Yes, sir.

THE COURT: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Is there a nerve which supplies the thumb alone?

A. Well, the branches from this radial nerve. The radial nerve comes down in this way (illustrating), and branches to supply those three fingers and a half.

Q. Then the injury would have to occur,—in order to render the thumb alone numb by reason of an injury to the nerve, the injury would have to occur below the point of the nerve, below the point where it branches off from that portion of the radial nerve which goes into the other fingers?

A. Yes, sir.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. McFARLAND:

Q. You were requested to make this examination by the defendant or the defendant's attorneys, weren't you?

A. Yes, sir.

Q. You were representing the defendant company when you made that examination?

A. I don't think you could say I was representing them.

MR. FOX: He made that examination for us.

MR. McFARLAND: If the Court please, we will have some rebuttal, and on account of Doctor Worthington being so busy since this examination was made I haven't had an opportunity of talking with him, I would like to confer with him to ascertain

whether or not I should put on any more of that testimony, or any testimony in rebuttal to the testimony of Doctor Eikenbary.

MR. FOX: I have no objection whatever. I can let my witnesses go, I think.

THE COURT: Do you rest?

MR. FOX: We rest.

THE COURT: We can't adjourn until tomorrow morning, gentlement; we must submit this case tonight.

MR. McFARLAND: Very well. Until seven o'clock this evening then? Just so I have an hour's time to talk with my client and one witness and Doctor Worthington.

THE COURT: Very well. We will make it at seven-fifteen. Gentlemen, remember the admonition I have heretofore given you, and return at seven-fifteen this evening.

An adjournment was thereupon taken until 7:15 p. m., Thursday, Nov. 23, 1916.

7:15 p. m., Thursday, Nov. 23, 1916.

C. E. WORTHINGTON, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. You heard Doctor Eikenbary's testimony, did you not?

A. Yes, sir.

Q. Were you present at the time he made the examination of the plaintiff?

A. I was yesterday morning.

Q. That was in your hospital?

A. At my place, yes, sir.

Q. And you had made an examination of the plaintiff before that, had you?

A. I had, two or three days before that.

Q. Now I will ask you, did you hear Doctor Eikenbary ask the plaintiff, through the interpreter who was present at that time, whether he had ever had clap, syphilis, or gonorrhea, at that time?

A. Yes, sir.

Q. What was the answer of the plaintiff?

A. He said he had never had it.

Q. Did you hear him ask him whether he had been married?

A. Yes, sir, he asked him that question two or three times.

Q. What did he say?

A. He said he had not.

Q. You heard what Doctor Eikenbary stated about his ear?

A. Yes, sir.

Q. Did you call his attention to the ear?

A. I did.

Q. Did he make an examination of the ear?

A. No, he didn't make any examination. He said he wasn't a specialist on the ear, and he didn't care to make an examination of the ear.

Q. And he didn't examine the ear?

A. No, sir.

Q. What about the temple?

A. His attention was called to that.

Q. By whom?

A. I called his attention to it, and the plaintiff there called his attention to it, but I think Dr. Eikenbary didn't understand him.

Q. But he didn't make any examination?

A. No, I don't think the Doctor understood him. He didn't make any examination.

Q. Did the doctor proceed to examine his back?

A. He did.

Q. Tell the jury just what he did.

A. First he placed him on his stomach, and pressed his back, pressure on both sides of the spine, and the muscles of his back, and then he had him turn on his back again, and he put his arms under his legs and doubled his limbs up over his body, and then after doing that he twisted his limbs around so as to bring a twist in his back, first one way and then the other.

Q. What is the fact as to whether the plaintiff indicated any pain?

A. He indicated considerable pain, I thought.

Q. How did you determine that fact?

A. Well, he groaned when he done that.

Q. Did he wince any?

A. Yes, he did.

Q. Now that trouble about the stomach, that tumor?

A. Well, this a growth there of some character. I don't know what it is.

Q. Did you and the doctor agree as to the extent or seriousness or the non-seriousness of it?

MR. FOX: I don't think that is proper.

MR. McFARLAND: I will change that.

Q. Did you determine whether it was serious?

A. We were practically of the same opinion.

MR. FOX: I make the same objection. It is not proper rebuttal, if Your Honor please.

THE COURT: Sustained.

MR. McFARLAND: Q. Doctor, in regard to those lumps under the heel, you discovered those, did you?

A. I discovered a tenderness there.

Q. What do you call those.

A. Nodules on the bond.

Q. If they had been caused by venereal disease would they have developed recently?

MR. FOX: I don't see how the doctor can possibly answer that question.

MR. McFARLAND: Q. Well, if you know.

A. They wouldn't develop,—I wouldn't think they would develop to the extent they have, suddenly; they would come on gradually.

Q. Assuming that he received these injuries that he claims he received on the 8th day of May, and hadn't had that trouble to his foot, would they have come on to the extent that they appear from that time on?

A. I hardly think they would.

Q. I will ask you to state, from your experience and observation as a physician and surgeon, and from your examination of the plaintiff, whether or not the injuries and disabilities which you discovered

upon your examination of him could have been sustained by heavy rocks falling on him?

MR. FOX: It isn't proper rebuttal testimony, if Your Honor please. It has been gone over by this physician on direct examination.

MR. McFARLAND: It is contradicting Dr. Eikenbary.

THE COURT: No, I don't think it is. Dr. Eikenbary didn't testify—

MR. McFARLAND: Well, then I am satisfied to leave it the way it is, if that is the case. You may inquire.

CROSS EXAMINATION by
MR. FOX:

Q. You say Dr. Eikenbary told you he wasn't a specialist on the ear?

A. Yes, sir.

Q. And therefore he refused to make an examination of the ear?

A. He simply said, "I am not a specialist on the ear," and he didn't make any examination.

Q. And he felt as a physician that he shouldn't testify about—

A. I don't know how he felt about it, but he didn't make it.

Q. And you are not a specialist?

A. I am not.

MR. FOX: That is all.

LOUIS ANDERSON, heretofore duly sworn in his own behalf, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by
MR. McFARLAND:

Q. Do you know Andy Berg?

A. Yes.

Q. Just before you got hurt in this mine did he come around and tell you that that was a dangerous place to work?

MR. FOX: I object as not proper rebuttal testimony. It was gone into in chief. He denied the conversation, and I proved it by way of impeachment.

MR. McFARLAND: We have a right to direct his attention to it afterwards, if the Court please. I presume that Mr. Fox endeavored to lay the grounds and foundation for an impeaching question.

MR. FOX: I did.

MR. McFARLAND: And yet at the same time we have a right to ask whether that conversation took place.

MR. FOX: He is simply denying it. There was no change in the conversation. If counsel can indicate that it was different—

THE COURT: Yes. If he has denied it once a second denial wouldn't add anything to it.

MR. McFARLAND: Very well. I am satisfied with that.

Q. Did Andy Berg call your attention to any crack in the back or roof of the mine at that time?

A. No.

Q. Was there any crack in the roof or back of the mine that you could see?

A. No, sir.

MR. FOX: I move that the answer be struck out until I have an opportunity to make my objection. That is not proper rebuttal testimony. The condition of the place has been amply testified to by this witness. Now he can't amplify it in any way.

THE COURT: I don't remember that he was asked the question as to whether or not there was a crack there.

MR. FOX: Very well; if the Court doesn't remember it. He has answered the question.

MR. McFARLAND: Well, then, you agree that he has denied that he said that he could get out of the way of that if it fell down?

MR. FOX: Make your proof, counsel.

MR. McFARLAND: All right, then.

Q. Did you tell Mr. Brown, the shifter, or did you tell Andy Berg, or either of them, that you could get out of the way if that slab fell down?

MR. FOX: I object to that.

A. I never said that.

MR. FOX: As not being proper rebuttal.

THE COURT: Yes, that is true.

MR. McFARLAND: Well, I asked counsel to agree to that.

Q. Did you ever have anything the matter with your privates, any disease, to your penis, or your pecker?

A. No.

Q. You remember Dr. Eikenbary examined you up at the hospital the other day?

A. Yes.

Q. Did you tell him that you had had the clap?

A. No, I never did.

Q. Did you tell him that you had had clap? Did you tell the doctor that you had had clap?

A. No, sir.

Q. Did you tell him that you had had gonorrhea?

A. Yes.

Q. What do you mean by gonorhea?

A. I couldn't tell.

Q. Now listen, Louis. Did you tell him that you had anything the matter with your pecker, down here (indicating)?

A. No, sir, I aint got no trouble of that kind at all.

Q. Did you ever have?

A. Never had.

Q. What did you tell him you had trouble with, —a rupture?

A. Yes, sir.

Q. Where is that rupture?

A. Right in here, in my right side.

Q. Did you tell him that you had had syphilis?

MR. FOX: The doctor didn't say that, if Your Honor please. It is not proper rebuttal. The doctor didn't claim that this man ever said he had syphilis.

THE COURT: I think that is true.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by
MR. FOX:

Q. When you talked to the doctor you didn't talk to him in English at all, did you?

A. Yes, I talked English and the other fellow talked too.

Q. This interpreter of yours?

A. Yes.

Q. The doctor asked him in English and the interpreter asked you the question in Finnish, and you answered in Finnish, isn't that the way it was? You didn't talk to the doctor in English, did you?

A. Yes, I talked in English.

Q. You could talk enough English to explain to the doctor what was the matter with you, you told the doctor what was the matter with you in English, is that the idea?

A. Yes,—not every time.

Q. Not every time?

A. No.

Q. Sometimes?

A. Yes, but I can understand—

Q. You know in English—

MR. McFARLAND: Let him get through.

A. I didn't understand. The other fellow was with me, and he explain.

Q. You know what the word clap means, don't you?

A. Yes.

MR. FOX: That is all.

RE-DIRECT EXAMINATION by
MR. McFARLAND:

Q. Did you tell the doctor you had clap?

A. No, sir, I never said that.

MR. FOX: I move that the answer be struck out?

THE COURT: Anything else, gentlemen?

MR. McFARLAND: Q. Are you a Finlander?

A. Yes, sir.

MR. McFARLAND: That is all.

FRANK RAALE, produced as a witness for plaintiff in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. McFARLAND:

Q. What is your name?

A. Frank Raale.

Q. How old are you?

A. I am thirty-six.

Q. What is your business?

A. Rancher at the present time.

Q. Where do you live?

A. Enaville, Idaho.

Q. How long have you lived in Idaho?

A. Thirteen years.

Q. Are you acquainted with the plaintiff, Louis Anderson?

A. Yes, sir, lately.

Q. How long have yon known him?

A. I have known him for about a month.

Q. What has been your business before you went to ranching?

A. Mining.

Q. Have you worked in any of the big mines in the Coeur d'Alenes?

A. I have in several.

Q. Name them.

A. Interstate-Callahan, and the Last Chance, Federal Company, Bunker Hill & Sullivan, Hypotheek, Empire Copper Company, and several small prospects, Polaris Mining Company, development company it is called, and prospecting.

Q. How long altogether did you work in those mines?

A. From ten to thirteen months at a stretch.

Q. What particular work did you do in those mines?

A. Every line of work that there is required of a miner. There is six different classes of miners. I don't know which class you refer to.

Q. Did you ever act as a machine man, running a drill?

A. Yes, sir.

Q. Mucker?

A. Yes, sir.

Q. Do you know what is meant by a nipper in a mine?

A. I do.

Q. What are the duties of a nipper?

A. The nipper's duty is, in most of the mines, to take out the dull steel and carry in the sharp steel and picks also, and in some mines it is the custom that the nipper brings the powder around to the machine men before shooting time.

Q. After the shift goes off, the nipper takes the tools away to get them sharpened, and does he always bring them back in time for the next shift to use them?

MR. FOX: I object to that as incompetent, irrelevant and immaterial. The question is not what they always do, but what was done on this occasion, if Your Honor please.

MR. McFARLAND: If the court please, he introduced that same class of testimony.

MR. FOX: In the second place, it isn't what the custom might have been in some other mine. The question is, what were the things done in the Morning mine at or about the time the plaintiff was injured.

MR. McFARLAND: He never worked in the Morning mine.

MR. FOX: Then I don't see how he could testify as to what was done in other mines as being binding on us.

THE COURT: Objection sustained.

Q. Were you at Doctor Worthington's at the time Doctor Eikenbary examined Louis Anderson?

A. I was there yesterday morning.

Q. Did you act as interpreter for Anderson?

A. I did, sir.

Q. You heard Dr. Eikenbary ask Anderson if he had had the clap?

A. He had a different word for it.

Q. What was it?

A. It was, as near as I could understand, he didn't ask about the clap, but he asked if he had a rupture, but he said, "No use to ask him, because I can see it, because he had the bandage."

Q. Did he ask him anything about the gonorrhea?

A. No, he asked him about the syph.

Q. Syphillis?

A. Yes, syphillis.

Q. Did you interpret that question, when he asked him if he had ever had syphillis?

A. Yes, sir.

Q. What did he answer?

A. He said no.

Q. What did you tell the doctor?

A. I told him no.

Q. Did he ask him if he had ever been married?

A. Yes.

Q. And what did Louis say?

A. He said he never was.

Q. Did he ask him if he had ever been sick before?

A. Yes.

Q. Before he got hurt?

A. Yes.

Q. And did you ask Louis that question?

A. Yes, sir.

Q. What did Louis say?

A. Yes.

Q. What did you say?

A. I told him no.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. Your name is Frank Raale?

A. Yes, sir.

Q. You were up to get citizenship papers before Judge Woods —

A. I was —

MR. McFARLAND: We object to that and assign that as error, if Your Honor please.

MR. FOX: We want to make an offer of proof.

MR. McFARLAND: Well then, make it out of the presence of the jury.

MR. FOX: I am perfectly willing to do it.

MR. McFARLAND: I don't want these prejudicial questions —

THE COURT: Gentlemen of the jury, you may step out in the hallway a few minutes.

(The jury thereupon retired from the court room.)

MR. FOX: If Your Honor please, I want to make proof that this man at two terms ago, in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, made application to the Honorable William W. Woods, then judge of that court, for citizenship to the United States, he being a subject of the Emperor of Russia, to-wit, a Finn, and that upon examination citizenship papers were denied him because of the fact that he was a person of bad moral character.

MR. McFARLAND: We object to the offer as immaterial.

THE COURT: The offer is denied.

MR. FOX: I will take an exception, if Your Honor please. That is all.

MR. McFARLAND: That is all.

WITNESS: Gentlemen, haven't I got a right —

MR. McFARLAND: You go and take your seat.

THE COURT: That is, unless you direct my at-

tention—I don't understand on what theory you offer such proof.

MR. FOX: On the question of moral character.

MR. McFARLAND: It can only be directed to impeachment, and the statute of this state —

THE COURT: Bring in the jury.

(The jury thereupon returned into court.)

THE COURT: Have you any other witnesses?

MR. McFARLAND: No. The plaintiff rests, Your Honor.

MR. FOX: I desire to renew my motion for a nonsuit, if Your Honor please, and make a motion for a directed verdict.

THE COURT: You may make it.

MR. FOX: Comes now the defendant, and moves the court to direct the jury to bring in a verdict for the defendant, for the following reasons, to-wit:

1. That the plaintiff has wholly failed to show any negligent act or omission on the part of the defendant which was the proximate or any cause of the accident or injury complained of in plaintiff's complaint.

2. That if the plaintiff was injured while in the employ of the defendant, as alleged in his complaint, he was injured by and through the negligence and carelessness of a fellow servant.

3. If the plaintiff was injured as complained of in his complaint, he was injured by and through his own negligence and carelessness, and his own contributory negligence and carelessness.

4. If he was injured as alleged in his complaint,

he was injured by and through a risk of his employment which was plain and obvious to the plaintiff, and which risk was assumed by the plaintiff.

5. It is not alleged in the complaint, and the defendant was not advised, that the plaintiff would claim in this case that he was injured by and through an erroneous and careless and negligent direction of the shift boss.

THE COURT: The same ruling as heretofore. The motion will be denied.

MR. FOX: If Your Honor please, I have written out the substance of three instructions that I would like to have Your Honor look over. I will say that they are not as carefully drawn as I would have liked to have them drawn, but the substance is there.

THE COURT: Address the jury.

(Argument to jury by counsel.)

THE COURT: Gentlemen of the jury, this case arises in this way: The law of the state provides that if one who is employed by another is injured as a consequence of the negligence of the employer, he, the injured person, may recover such damages as under all the circumstances would seem to be just. The measure of the damages I will explain to you a little later on. One of the primary duties of a master, as we say in the law, or an employer, is to use reasonable care to see that the tools furnished to the servant, here the plaintiff, and the place where he is required to work, are reasonably safe. The plaintiff alleges that the defendant in this case failed in the discharge of this obligation to him. In a general

way I may say to you that it is charged by him that while employed as a miner in the defendant's mine in Shoshone County, the defendant failed to furnish to him the necessary tools by which he, the plaintiff, could determine whether or not the stope where he was working was in a safe condition, and that it, the defendant, failed to warn him of such unsafe condition.

Now when we come to the testimony of the plaintiff, his claim more particularly seems to be that while employed as an experienced miner in the stope to which he has referred, upon going to work upon the afternoon or evening in question, he looked for a bar, pinch bar, I think it is commonly called, or sometimes called, anyway a steel bar, by which the miner determines whether or not there is any loose, overhanging rock, and by which, if he finds there are clinging rocks, he bars them down, or pries them off, as the case may be, so that there will be no danger from that source. He further testifies in substance, and I am only giving you the general substance of his testimony, that, not finding such bar, he was inspecting the place as best he could with the appliances at hand, and before he had completed the inspection so as to satisfy himself that it would be safe to go to work there with his drill, the shift boss, a Mr. Brown, came along, and asked him what he was doing, and expressed dissatisfaction with the delay, and directed him to go with his work as a machine man, and in substance assured him that the place was safe. Now, the plaintiff concedes in his testi-

mony that he was an experienced miner. He further tells you that, as such experienced and skilled miner, it would have been entirely possible and practicable for him to detect the danger in this overhanging wall, or the back, or roof, as it is called, had he had the ordinary appliances, the bar, or had he been given sufficient time to make the discovery, but that notwithstanding his skill and ability to make such a discovery had he been given the time and the instrumentalities, he yielded to the suggestion or direction of the foreman and went on with his work, relying upon the assurance of the shift boss that the place was safe. Now in this testimony he is perhaps corroborated to some extent; it is for you to say whether at all, and, if so, how much, by the witness Thomas Simih. Upon the other hand,—(I am referring to the testimony because I am going to instruct you that there is substantially but one question or issue of fact upon which you are to find, and your finding as to that fact will depend whether your verdict will be for the plaintiff or the defendant) —the testimony of the shift boss, Brown, upon the other hand, is to the effect that he observed the condition of the back of the stope, noticed that there was a long, open crack, and felt that it was a dangerous situation, that it was bad ground, as they call it, and called it to the attention of the plaintiff, with the suggestion that it was dangerous. Some reply was made by the plaintiff, and he again made the statement that it didn't look good to him, or something to that effect. But yet

that he, after warning the plaintiff in that manner, went on, and a short time afterwards the accident occurred. In some of these particulars at least he is corroborated in a measure, if you believe the testimony by the witness Andy Berg, and the witness John Conlon.

Now, if you find that the plaintiff's testimony is substantially true, and that he did not observe any crack in the back of the stope, and that he had not finished his investigation, but that he was diverted therefrom by the direction of Mr. Brown, if you believe that his testimony is substantially true, you should find in his favor. The burden is upon him of showing by a preponderance of the evidence that the conditions that he has testified to were substantially as he testified, and that he had substantially the conversation with the shift boss that he related. By a preponderance of the evidence is not meant necessarily a greater number of witnesses. Sometimes it turns out that the testimony of one witness may be more convincing, may be more persuasive to the jury or to the court, or outside of court, as far as that is concerned, than the testimony of two or three or four witnesses. It is for you to say upon which side the truth lies, and whether or not you will attach greater weight to the testimony of the plaintiff, and that of Thomas Simih, so far as it is pertinent and corroborates him, or whether you will attach greater weight or equal weight to the witnesses for the defendant, because if the testimony were equally balanced upon that issue it would be your duty to find for the de-

fendant, the burden being upon the plaintiff to show the truth of that which he alleges to be true, by a preponderance or greater weight of the testimony.

Upon the other hand, if you disbelieve him, if you find that his testimony is not substantially true, and if you find that the testimony of Mr. Brown is in accordance with the truth, is substantially true, and thus find that the plaintiff was advised of this condition, his attention was directed to it, he was warned that it was dangerous, and if thereafter, notwithstanding such warning, he continued to work and subject himself to unnecessary peril, then he assumed the risk of any danger that might ensue, of any accident that might follow therefrom; he would be chargeable himself with the negligence, he would be chargeable with the assumption of whatever risk there was after his attention was called to it and he continued to subject himself to it. I say that because he admits that he was an experienced miner, and was able to appreciate the dangers from conditions of that sort. So that the primary issue, gentlemen, upon which you are to find is as to whether or not the testimony of the plaintiff is substantially true or the testimony of the shift boss, Mr. Brown, is substantially true. If you support the plaintiff's testimony, you will find in his favor. If you do not support it, but find Mr. Brown was telling the truth substantially, then you will find for the defendant.

Now, if your finding upon this issue should be for the plaintiff, then it is for you to say what the amount of his recovery should be. The law does not pre-

scribe any definite or specific standard by which a man's damages may be measured, where he has suffered a personal injury, and you will very readily see that it would be difficult to fix any measure by which a jury could be definitely guided. An arbitrary amount might be prescribed by the statute, but the legislature has not seen fit to do that. It has left that matter to the good sense and reasonableness of a jury made up of twelve men, it being assumed that your composite judgment would probably award a just amount. So it is for you to determine, in the light of the evidence which you have,—you can't go outside of the evidence,—in the light of the evidence you have, what is a reasonable compensation to the plaintiff for his injuries, such as he suffered at that time, if you find that the defendant was responsible for them. You may take into consideration the pain, if any, which the plaintiff has suffered, and that which he is likely to suffer in the future. Take into consideration the impairment of his physical ability, his capacity to perform work, to earn money, to make a living for himself, his capacity for enjoyment of life, including the right to earn a living and make money, determine this in the light of all the evidence, including that of the physicians, insofar as you may be able to credit their testimony.

I cannot assist you very much, gentlemen, on the general question of the weight to be given to the testimony or the credibility of the witnesses. You may not find the duty which you have to discharge in a case of this kind a difficult one, or you may find

it to be easy. These witnesses, that is, some of them, have testified directly contrary one to the other. All of them could not be telling the truth. It is for you to say whether any one of them has wilfully perverted the truth. So far as is possible, it is the duty of jurors to reconcile the testimony where there are discrepancies, but where it is impossible to do so of course you will have to reject the testimony of one witness or another. Generally speaking, you should apply the rules that you have learned in the practical experience of life, having in mind the motives by which men are actuated, the incentives to speak the truth or to color it or pervert it, the interest, direct or indirect, which any witness may have, his intelligence or want of intelligence, etc. You have seen the witnesses testify, and you are quite as able as I am to determine who has told the truth and what weight to give to the testimony.

Two forms of verdict have been prepared. One is simply, "We the jury in the above entitled cause find for the defendant." That you will use in case you find in favor of the defendant. The other is that you find in favor of the plaintiff, and you assess his damages against the defendant in the sum of blank dollars. A blank is left in which you will insert the amount which you award the plaintiff, if you find in his favor at all. In either case, if you agree upon a verdict, your foreman will sign it, and you will come into court.

Different from the practice in the state court, it is necessary that all of you concur in finding a ver-

dict. Some of you may have been upon juries in the state court, and in civil cases there nine of you agreeing may return a verdict. In this court it is necessary that you all agree before you can return a verdict.

Perhaps I should make one other suggestion. If you find in favor of the plaintiff, and also find some difficulty in agreeing upon the amount which should be awarded, it would be improper for you to resort to what is called lot or chance. Juries sometimes in such a predicament, in order to reach an agreement, adopt the plan of each one writing the amount which he thinks should be awarded on a piece of paper, and then adding all twelve amounts together and dividing by twelve, and take that as the verdict. That would be an improper thing to do. The verdict is supposed to be the result of your judgment, and not the result of a resort to chance in that way. Try to agree upon a verdict, gentlemen. Use your best endeavor so to do. Listen to fair discussion, and see whether you cannot bring your minds to agree upon one result. Let the bailiff be sworn.

MR. FOX: It is my understanding that the practice requires that the exceptions taken to the instructions should be taken before the jury retires, Your Honor.

THE COURT: Yes. The jury may retire to the hallway, and I will call them back if I decide to modify the instructions.

(The bailiff was thereupon sworn.)

THE COURT: You will observe this oath, gentlemen. Retire now with the bailiff.

(The jury thereupon retired from the court room.)

MR. FOX: The defendant now objects and excepts to that portion of the instructions of the court to the jury to the effect that it is one of the duties of the defendant in this case to furnish the plaintiff a reasonably safe place in which to work, for the reason that the duty of providing a reasonably safe place in which to work does not extend to places or structures made dangerous by the very work in which the workman is engaged, so far as that safety depends upon the due performance of the work by the workman and those who stand in the relation to him of fellow servants.

2. The defendant objects and excepts to that portion of the instructions of the court to the jury which advises the jury that the testimony of the plaintiff is corroborated by the testimony of the witness Simih, for the reason that in no particular is such testimony corroborative.

3. The defendant objects and excepts to that portion of the instructions of the court to the jury which advises the jury in words and effect that it was necessary that the plaintiff in this case should have been warned of the danger by the shift boss or have it brought to his attention, otherwise the defendant would be liable. I don't quite remember the language of Your Honor, but I think you laid stress upon the fact that the plaintiff should be warned in this case.

THE COURT: I didn't intend so to instruct.

MR. FOX: It is quite difficult to keep in mind the entire instruction.

THE COURT: I think you may bring the jury back. I doubt whether the jury would put the construction upon the instructions which you seem to suggest here, but in order to avoid any question and to guard against it in any way, on the first two points—I am quite sure that on the last point I gave no such impression.

MR. FOX: Would Your Honor care to have a statement of the law in reference to that question?

THE COURT: No.

(The jury was thereupon returned into court.)

THE COURT: Gentlemen, my attention is directed to two particulars in which it is thought you may misunderstand what I intended to say to you.

First. I did not intend to express the opinion that the plaintiff is necessarily corroborated by the witness Thomas Simih. I meant to suggest that you might find,—might or might not find that he is corroborated by him. It is for you to say what the facts are, and you may disregard any view that you may think I entertain, or that you may think that I have expressed in the course of these instructions, as to the facts, or as to the issues of fact. I merely intended to direct your attention to that in order to make clear the issue. It is for you to say whether Simih does or does not corroborate the plaintiff's testimony.

In the second place, it may be that you did not fully understand what I meant to say to you about the duty of the master, the defendant in this case, to use reasonable care to see that the place where the plaintiff was working was kept in a safe condition. I did

say, and intended to say, that that is a primary duty of all employers of labor. In this case, however, under the conditions, it was entirely proper for the defendant to discharge that duty to one like the plaintiff by employing him as a skilled miner, as a miner of experience, and impose upon him the duty of making inspection of the place where he was about to go to work, and to bar down any loose rock. He, upon his own testimony, assumed that duty in this case. He admits that that was his duty, and hence the defendant company was not in the first place responsible for the discharge of that duty to him. It was his duty to bar down this rock and his duty to make inspection and see whether the place was safe. And if the foreman did not, while he, the plaintiff, was making such inspection, come along and direct him to stop his inspection, and to go to work with his drill, then, as I have already tried to make plain to you, he couldn't recover, and, as I have tried to make plain to you, it comes to be merely a question of fact as to whether or not the plaintiff is telling the truth about what Brown said to him, or whether Brown is telling the truth in his testimony as to what occurred there when the two were together. That is all. You may retire now with the bailiff.

(The jury thereupon retired to consider their verdict.)

The jury returned into court at eleven-thirty P. M., Thursday, Nov. 23, 1916, with the following verdict:

"*In the District Court of the United States for the District of Idaho, Northern Division.*

LOUIS ANDERSON, *Plaintiff*,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation, *Defendant.*

VERDICT.

No. 655.

We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant in the sum of $7,500.

J. J. HURM, Foreman."

Filed Nov. 23, 1916.

W. D. McReynolds, Clerk.

9:30 A. M., Friday, Nov. 24, 1916.

MR. FOX: If Your Honor please, in the case we tried yesterday I would like to have sixty days stay of execution. I desire to file a motion or petition for new trial.

THE COURT: Very well. I suppose there is no objection, Mr. McFarland?

MR. McFARLAND: I think not, Your Honor.

THE COURT: Sixty days stay of execution.

MR. FOX: If Your Honor please, I neglected to ask Your Honor to include in that order an opportunity for us to file a bill of exceptions in thirty days, instead of ten days, as provided by the rule.

THE COURT: Very well. Thirty days for the defendant in which to prepare and serve proposed bill of exceptions. You are aware, of course, that a

bill of exceptions is not necessary on your motion for new trial?

MR. FOX: I understand that, Your Honor.

And comes now the defendant, Federal Mining & Smelting Company, and serves, presents and files the foregoing as and for a full, true and correct Bill of Exceptions of all rulings made at and during the course of the trial of the above entitled action in the above entitled Court, which said rulings were duly objected and excepted to by the defendant, upon the grounds mentioned therein, said exceptions being accompanied with the whole evidence in said case, the same being necessary to explain the said exception, and each and every of them, and their, and each of their, relation to the case, and to show that the said rulings, and each and every of them, tended to prejudice the rights of the said defendant.

Dated at Wallace, Idaho, this 22nd day of December, A. D. 1916.

FEATHERSTONE & FOX,
Attorneys for Defendant,
Wallace, Idaho.

Service of the foregoing Bill of Exceptions accepted and the receipt of a true and correct copy thereof admitted at Coeur d'Alene, Idaho, this 23rd day of December, A. D. 1916.

Lodged Dec. 23, 1916.

McFARLAND & McFARLAND,
Attorneys for Plaintiff,
Coeur d'Alene, Idaho.

Duly allowed and settled as the defendant's Bill of Exceptions, this 17th day of February, 1917.

FRANK S. DIETRICH,
Judge.

Filed Feb. 17, 1917.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)
No. 655.

PETITION FOR NEW TRIAL

To the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, the petition of the Defendant Federal Mining & Smelting Company, respectfully represents:

The defendant Federal Mining & Smelting Company respectfully petitions the above entitled Court and Judge thereof to set aside the verdict rendered by the jury in the said cause in the sum of seventy-five hundred dollars ($7500.00) on the 23rd day of November, 1916, and the judgment entered thereon, which judgment was entered on the 24th day of November, 1916, and to grant this defendant a new trial in said cause for the following reasons and upon the following grounds, to-wit:

1. Because of errors occurring at the trial.

2. Because of the insufficiency of the evidence to justify the verdict.

3. Because the verdict and the judgment thereon is against the law.

4. Because of surprise which ordinary prudence could not have guarded against.

5. Because of irregularity in the proceedings of the adverse party by which the defendant was prevented from having a fair trial.

6. Because excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

As to the errors in law occurring at the trial, the defendant specifies the following particulars which it relies upon, to-wit:

(a) The Court erred in denying the defendant's motion for a non-suit made at the close of all of the testimony given on behalf of the plaintiff.

(b) The Court erred in denying the defendant's motion to direct a verdict for the defendant which motion was made at the close of all of the evidence.

As to the point of the insufficiency of the evidence to justify any verdict in favor of the plaintiff, the defendant specified the particulars thereon as follows:

(a) The evidence wholly fails to disclose any negligence on the part of the defendant, but does disclose that it was the duty of the plaintiff to make the place in which he was working secure against danger by barring down or otherwise securing the place by means well known to the plaintiff as an experienced miner, and the evidence conclusively shows that any injuries which the plaintiff may have sustained were the result of the fall of rock from the roof or back of the stope at the place in which

he was working and into which he was drilling, and was one of the obvious risks which he assumed upon entering the employment of the defendant.

(b) The evidence of the plaintiff to the effect that he was assured of the safety of the ground under which he was working and directed to work is irrelevant, incompetent and immaterial in this case for the reason that such evidence is not within the issues, there being no allegation in the pleadings that the plaintiff was injured by reason of his having been assured that the ground was safe and had been directed to work there without making an inspection which he was ordinarily required to do.

(c) Even if it is conceded that the testimony of the plaintiff is true that he was assured by the shift boss that the ground under which he was working was safe and was directed by him to work there, then the evidence conclusively discloses that the plaintiff and the said shift boss were fellow servants; the evidence conclusively disclosing that the shift boss was not engaged in the performance of a non-delegable duty of the master in giving such assurance and direction.

Moreover, the evidence of the alleged assurance of safety and direction of the shift boss to the plaintiff is insufficient to warrant the conclusion that the plaintiff actually received such assurance and direction at all. And it is entirely insufficient to warrant a conclusion that the plaintiff relied thereon, or had reason for doing so. But the evidence conclusively discloses that, as

an experienced miner, of more than 16 years' experience, and especially in view of his intimate knowledge of the duties of a machineman in that mine, the plaintiff knew that he had no right to rely upon such assurance or follow such direction, if the same were actually given, for the following reasons:

1st: Because plaintiff knew that the shift boss had not seen the place where the plaintiff was working on that day;

2nd: Because plaintiff had more time and greater opportunity than the shift boss to ascertain the nature of the ground;

3rd: Plaintiff knew that under the rules and customs of that mine it was his own duty to inspect the ground under which he was working and to ascertain for himself, for the purpose of protecting himself, whether or not the place was safe, and, for the purpose of making the same safe, to bar down or otherwise secure the place; and the plaintiff knew that it was no part of the duty of the shift boss to make such detailed or particular inspection, nor was it the duty of the shift boss to bar down, or secure the place where the plaintiff was working against the very danger from which the plaintiff sustained an accident and injuries, and

4th: The evidence not only fails to show that the shift boss had authority to interfere with rules and customs of the mine by making such assurance and giving such order, but it conclusively shows that the shift boss had no such right and authority, and that this was well known and understood by the plaintiff.

Moreover, it conclusively appears from the evidence that despite such assurance and direction, if the same were actually given, it was the duty of the plaintiff to inspect the place for himself and to make the same secure against danger, and that, therefore, if he failed to do so because of such alleged assurance and direction, he assumed the additional risk of working under rock and ore, which he knew, or in the exercise of reasonable care might or could have known, were dangerous and liable to fall.

Upon the point of the misconduct of the plaintiff by which the defendant was prevented from having a fair trial, we assign the misconduct of counsel in his argument to the jury. The same was practically entirely an appeal to the passion and prejudice of the jury against the defendant. By way of illustration we call the Court's attention to the statement of counsel in his closing argument to the jury in which he said in substance and to the effect, that the defendant would have been glad if more rock had fallen upon the plaintiff and had killed him, so that they would not have had to pay any damages because nobody would have heard anything more about it. In this connection we also call Your Honor's attention to the constant reference made by counsel for the plaintiff to the defendant in this case as "this corporation."

Upon the assignment of surprise which ordinary prudence could not have guarded against, the defendant specifies as follows:

The allegations of the amended complaint as to

negligence are that the plaintiff "Did not know and had no means of knowing and by the exercise of due care, caution and diligence could not have discovered the dangerous and unsafe condition of the place in, at and where he was performing his said duty, and did not know and had no means of knowing, and by the exercise of due care, caution and diligence could not have discovered that the said rock and ledge matter then and there being above and over him in the said mine where he was performing his said duty were loose, insecure or otherwise dangerous and unsafe,—and that prior to commencing his duty in the operation of said compressed air drill, he examined and inspected the place in which he was performing his said duties and examined the overhanging rock and ledge matter with as much care and caution as he was able to exercise,—he did not discover and could not by the exercise of reasonable care, caution and diligence have discovered that the said rock and ledge matter were loosened or insecure and liable to fall upon him; that under the terms of plaintiff's employment it was not his duty to test the condition of said overhanging rock and ledge matter, but that it was the duty of the defendant to carefully examine and test the condition of said overhanging rock and ledge matter before plaintiff commenced the performance of his duties in the operation of said drill or driller, which defendant negligently omitted to do; that the plaintiff, prior to receiving said injuries and prior to the time he commenced the performance of his said duties, as afore-

said, had a right to believe and did believe that the defendant carefully tested the condition of the overhanging rock and ledge matter, and that the same was in a safe condition; that the defendant at or prior to the time plaintiff received said injuries could by the exercise or ordinary care, caution and diligence have discovered said unsafe and dangerous condition of said rock and ledge matter where he was performing his said duties, but negligently and carelessly failed to do so and carelessly and negligently permitted the plaintiff to continue his said duties with apprising or warning him of said danger."

Upon the trial of the case the plaintiff not only abandoned every ground of negligence alleged in the complaint, but admitted, time and again, it was not true as alleged in his complaint that it was the duty of the defendant to make the place in which plaintiff was working safe, but that under the customs and rules of the mine it was his duty to do so, and excused his failure to do so by an alleged assurance of safety and direction by the shift boss to drill without making the place secure. In the very nature of the case it was impossible for the defendant, taken by surprise as it was by this entire change in the theory of the case and in the grounds of negligence, to adequately prepare or present the defendant's case. It was impossible with intelligence and foresight to closely examine the plaintiff and to present the defendant's side of the case.

As to the point that the verdict is excessive, it manifestly appears that the same was rendered through passion and prejudice of the jury against the defendant; the jury were out only a short time and apparently split the difference and gave the plaintiff one-half of the amount claimed. The testimony conclusively shows that the plaintiff did not suffer any permanent physical injuries, no bones were broken and no nerves injured, the only apparent symptom being pain, which is a subjective of symptom, and which can easily be claimed or exaggerated without any real physical reason or foundation therefor. The verdict and judgment in this case should in no event have exceeded the sum of $500.00 and is excessive by the sum of seven thousand dollars ($7000.00).

This petition is made upon the pleadings and papers on file, the minutes of the court and the evidence and all the proceedings in the case.

Wherefore your petitioner, Federal Mining & Smelting Company, prays that your Honorable Court will set aside the verdict of the jury and judgment thereon and will grant to petitioner a new trial in said cause.

Dated at Wallace, Idaho, this 21st day of December, 1916.

FEATHERSTONE & FOX,
BRANCH BIRD,
Attorneys of Defendant.

Residence and P. O. Address, Wallace, Idaho.

Service of within petition admitted and receipt of

a true and correct copy thereof admitted, at Wallace, Idaho, this 21st day of December, A. D. 1916.

McFARLAND & McFARLAND,
Attorneys for Plaintiff.
Wallace, Idaho.

Filed Dec. 26th, 1916.
W. D. McReynolds, Clerk.
By L. M. Larson, Deputy.

(Title of Court and Cause.)

DECISION ON PETITION FOR NEW TRIAL

April 25, 1917.

McFarland & McFarland, *Attorneys for Plaintiff.*
Featherstone & Fox, *Attorneys for Defendant.*
DIETRICH, *District Judge*:

It must be conceded that while the case approaches, it does not fall within, the exceptional rule that where the character of the work is such that the condition of the place, in respect to safety, necessarily changes and is constantly shifting as the work progresses, the master is relieved from his primary obligation to keep the place safe. The reason for this exception is that it would generally be impracticable, and sometimes impossible, for him in such a case to provide a safe place. In tearing down a structure, for example, or in blasting down coal in a coal mine, or barring down rock in a mine such as the one herein involved, conditions change from moment to moment, and it is wholly beyond the power of the master to make inspection or to provide for the safety of employes; the latter must look out for themselves.

But in the instant case such was not the condition at the time of the accident. The plaintiff was not "making his own place"; he was drilling holes into, not shattering, the solid rock, or loosening that which had been shattered. He might have worked indefinitely without substantially weakening the back of the stope or affecting the safety of the place where he was at work. If the place was dangerous when he went on duty, it was so as a consequence of the blasting which had taken place before. The blasting had been completed before his shift commenced, and the evidence abundantly shows that it was entirely practicable by inspection to determine whether or not the stope was safe, and, if not, in what particular it was unsafe, and furthermore it was practicable to put it into safe condition before the plaintiff entered upon the work of drilling. The defendant's printed rules, offered in evidence, recognize the practicability of safeguarding against accidents of this character, and the testimony on both sides supports this view. Indeed I do not understand that the defendant now contends otherwise. *Bunker Hill and Sullivan M. Co.* v. *Jones*, 130 Fed. 813. We start out, therefore, with the premise that primarily it was the positive, non-delegable duty of the defendant to make an inspection of the stope after the blasting was completed and before the work of drilling for additional blasts was resumed. Such inspection was not a detail of operation, but related to the duty of providing a safe place to work. To meet this view, the defendant invokes another well recognized exception to

the general rule, namely, that the master is relieved from responsibility for dangerous conditions where the injured employe, here the plaintiff, is, by express custom or contract, charged with the duty of making the place safe. In support of this branch of its defense, it introduced certain standing rules, by which employes are enjoined to take sufficient time to make the required examinations for the purpose of guarding against accidents, and to see that the place where they are employed is safe. It is very much to be doubted whether the plaintiff ever read these rules or heard them read or explained, but perhaps that consideration is unimportant in view of the conceded fact that he recognized it to be a general custom and rule in mining operations of this character for the experienced miner, such as he admits he was, when going on shift, to make proper inspection, and, if necessary, to bar down loose or shattered rock from the back of the stope. In short, he recognized that it was his duty to look out for his own safety in this respect. In response to this contention on the part of the defendant, which he concedes to be well founded both in fact and in law, the plaintiff claims that, recognizing his duty in this respect, he was engaged in making inspection as best he could, although the appliances reasonably necessary for that purpose were not at hand, and would have been able to detect the perilous condition of the slab which later fell upon him, and would have avoided the danger, had the foreman or shift boss not assured him that the place was safe, and ordered him to go to work with

his drill. There is a sharp conflict in the testimony upon this issue, he asserting and the foreman denying that such a conversation took place. The foreman testified that he himself called the plaintiff's attention to what he regarded as a dangerous condition, but that the plaintiff assured him that it was all right, and that in any event he, the plaintiff, was standing in such a position that if the slab fell it would not hurt him. The instructions were very specific upon this issue, and the verdict necessarily implies that the jury believed the testimony of the plaintiff and discredited that of the foreman. It was preeminently an issue for the jury, and their finding must be accepted as conclusive of the fact. It therefore remains to consider whether or not as a matter of law the defendant can be held responsible for the consequences of the imprudent and negligent conduct of its foreman or shift boss in directing the plaintiff to forego inspection with the assurance that the place was safe, and in ordering him to go on with his work. As I understand, it is conceded by the defendant that if the foreman, in respect to this direction to the plaintiff, was acting for and in the place of the defendant, was in effect a vice-principal, then the defendant could properly be held responsible (*Ohio Copper Co.* v. *Hutchins*, 172 Fed. 201), but it vigorously protests that the shift boss, though occupying a position of superiority to the plaintiff, is in law to be deemed merely his fellow servant, and that therefore the case is one where the plaintiff, in accepting employment, assumed all risk of danger from his negligence.

The record is not very specific touching duties of the foreman, but it is fair to infer that upon his shift he had complete charge of the mining operations upon the sixteenth and eighteenth levels of the mine, comprising twenty-two floors. At the particular time he had supervision of the work of from thirty-five to forty men, who were engaged here and there upon the several floors, and ordinarily he was able to visit each place where the work was going on twice during the shift. It is further to be inferred that he himself did no manual labor, but that his entire service was that of directing and superintending the work of others. Under these circumstances it is not entirely free from doubt that in respect to mining operations, strictly speaking, he was a fellow servant with the plaintiff. *Carnegie Steel Co.* v. *Yuhasz*, 224 Fed. 438. *Alaska M. Co.* v. *Muset*, 114 Fed. 66. But that question it is unnecessary to decide. We are here concerned with his status in relation to the positive duty of the defendant to use reasonable care to maintain the stope in a reasonably safe condition, for his imprudent instructions to the plaintiff pertained not to the manner of mining but to the matter of making the stope safe. The distinction is clearly drawn in *Kelly* v. *Mining Co.*, 41 Pac. 273, cited with approval in *Bunker Hill and Sullivan M. Co.* v. *Jones*, 130 Fed. 819.

In disposing of this particular question, I was at the trial, and upon more mature reflection I still am, inclined to attach much significance to one of the defendant's standing rules, which it offered in evi-

dence, namely, where it is provided that "each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and if necessary the foreman or shift boss must be notified." Doubtless the condition existing at the time of the accident was one falling within the class covered by this rule. Under the rule, it was the duty of the plaintiff himself to make examination to see whether the stope was safe before he commenced work. But it further seems to be equally plain that it was the intention of the defendant to constitute the foreman or shift boss its representative in respect to matters of safety, with power to determine what to do, and with authority to direct and control the miners in respect to such matters. Suppose that the plaintiff in this case had taken the time, and had been successful in discovering the defective condition of the stope, and, concluding that the defect was of such character that he could not remedy it, he desired to appeal to the master to make the place secure, where would he have gone? How could he have communicated with the defendant? Is it not manifest that this rule directed him to go to the foreman or shift boss? Did not the rule impliedly say to him that in respect to matters of safety he was to recognize the foreman as being the principal? Otherwise why notify the shift boss? There is no further provision that the shift boss should thereupon report to any

other officer of agent. The fact that here the shift boss came to the plaintiff instead of the plaintiff reporting to him, does not alter the case. If within this sphere the foreman was a vice-principal, his instructions were the instructions of the defendant, and necessarily imposed responsibility. Can there be any doubt of the consequences had the plaintiff declined to go on with his work when the foreman directed him to desist from further inspection, with the assurance that the place was safe? While the record does not expressly disclose the power of the foreman to discharge, such authority is to be inferred from the general nature and dignity of the position he occupied and indeed in the argument it is conceded. Not that this consideration is controlling, but it may be resorted to for light upon the question whether or not the parties understood that the plaintiff assumed the risk of the foreman's negligence in respect to conditions of safety. The doctrine contended for is so harsh that I am not inclined to give it place except upon the clearest authority. It seems to me that it would enable employers, by adopting the system here employed, practically in all cases to withdraw from the employe all substantial protection which the general rule of the master's positive, nondelegable duty was designed to afford. Nor when we come to examine the decided cases upon the subject do we find such clear authority. The defendant has furnished a very elaborate and able brief upon the question, with numerous citations. It is not strange that in none of them were the facts precisely the same.

Personal injuries happen under the greatest variety of circumstances, and personal injury claims often turn upon very slight distinguishing features. It is to be presumed that, out of the great multitude of cases, counsel have cited those deemed to be the most favorable to their contention. But upon examination it is found that most of them relate not to the maintenance of a safe place in which to work, but to the mere details of carrying on the work. We may briefly notice a few of them. In *City of Minneapolis* v. *Lundin*, (C. C. A., 8th Circuit), 58 Fed. 525, the work of blasting was being carried on continuously. Obviously it was wholly impracticable for the defendant city to keep safe the place where the plaintiff was at work. Assuming that his injury was the result of the negligence of the foreman of his gang, the court discussed the legal principles applicable, and in the course of the discussion it was said that: "Whether or not the master is liable for the negligence of such a servant (a foreman) in a given case must be determined by the nature of the duty in the performance of which he was guilty of negligence. If he was engaged in discharging an absolute duty of the master the latter is liable, otherwise it is not." But here, as already shown, the action of the shift boss related to an absolute duty of the master, the duty to inspect the stope for the purpose of seeing whether or not it was safe. In *Alaska Mining Co.* v. *Wheelan*, 168 U. S. 86, very frequently cited, the gist of the case is stated in one sentence of the syllabus, namely: "And the corporation is not liable to one

of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men." Very clearly there was not involved in the case any question of a safe place to work or of suitable and safe machinery and appliances. As the court said: "There was no evidence that he (the foreman) was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men," for its use. In *Martin* v. *Atchison, etc. R. R. Co.*, 166 U. S. 399, the foreman of a section gang, while traveling on a hand car, directed one of his men not to look out for approaching trains, and he, the foreman, carelessly failed to keep a lookout, but clearly this negligence related only to a detail of the work. In *Larson* v. *McClure*, 70 N. W. 662, the court said: "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants practically created the place and its attendant perils from hour to hour in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as the probable consequences, they must be held to have had notice." These cases are typical of the great majority of the decisions cited by counsel, and manifestly are not conclusive, even if we regard the shift boss as a fellow servant with the plaintiff, insofar as concerns his primary duty of mining, as distinguished from his

authority in the matter of maintaining safe conditions. In *Florence & C. C. R. Co.* v. *Whipps*, 138 Fed. 13, another case cited, the court lays great emphasis upon the fact that an emergency existed, and that careful inspection by the railroad company was impracticable. It was also held that plaintiff knew and was able to appreciate the perils, and assumed the risk. Still another case upon which the defendant relies, *Kelly* v. *Jutte & Foley Co.*, 104 Fed. 955, is not so easily distinguished, but with all due respect to the learning of the court, the reasoning of the decision does not impress me as being highly persuasive Moreover, it seems to me to be out of harmony with the principles recognized in *Metropolitan Redwood Co.* v. *Davis*, (9th C. C. A.), 205 Fed. 487.

Further in support of its contention, the defendant has cited *Davis* v. *Trade Dollar M. Co.*, 117 Fed. 122, *Bunker Hill etc.* v. *Schnelling*, 79 Fed. 263, and *The Westport*, 136 Fed. 391,—all decisions from the Circuit Court of Appeals of this circuit. While possibly tending to support the proposition that in matters of operation the shift boss and the plaintiff were fellow servants, the Schnelling and Westport cases have little, if any, direct bearing upon the precise question under consideration, which pertains not to matters of operation, but to the safety of the conditions under which the operatives were required to work. The facts in the Davis case are more nearly analagous, but it is readily distinguishable. Davis, a miner, was injured by the explosion of a missed shot. As his shift came on duty he and his associates were

informed by the foreman of the preceding shift that there were two missed shots, one in the back and one in the bottom of the tunnel. It turned out that one of these shots was in the breast rather than the bottom of the tunnel, but the court found that Davis knew that the preceding foreman had made no investigation, and he, the plaintiff, instead of making a careful investigation, assumed that one of the missed shots was under a pile of debris. It was held that he himself was negligent. The court says: "The rules of ordinary prudence required the plaintiff in error to require some member of his shift, before beginning to drill, to make an examination in the face of the tunnel, and discover the location of the unexploded blasts, and the evidence shows that the plaintiff in error himself made the examination. The foreman of the retiring shift did not pretend to say that he had made such examination. * * * The plaintiff in error, while making his examination, did not take the trouble to remove the debris at the bottom of the tunnel, which debris he erroneously supposed concealed an unexploded hole."

In conclusion upon this point, I think it must be held that primarily it was the positive duty of the defendant, by reasonable inspection, to maintain the stope in which the plaintiff was working in a reasonably safe condition; that such inspection would reasonably have been made subsequent to the explosion of the blasts fired by the preceding crew, and the method employed by the defendant in carrying on its mining operations contemplated such inspection; that it was proper for the defendant to impose upon the

members of the succeeding shift the duty of making such inspection and of barring down all loose rock before they commenced the work of drilling, and such was the duty of the plaintiff in this case; that, as the jury found, while plaintiff was so engaged in making the place safe for work, and before he had completed his investigation, he was directed by the foreman to desist from further inspection and to go to drilling, with the assurance that the place was safe; that the defendant had constituted the foreman its representative in respect to matters of safety, with authority to receive reports from subordinate employes and to act and give directions upon its behalf and in its stead; that, therefore, in effect, when the foreman directed the plaintiff to desist from further inspection and to go to work with his drill, the defendant relieved the plaintiff from the duty imposed by its general rules, of making the place safe, and itself resumed the full obligation and responsibility of a master in that respect.

It is further earnestly insisted that a new trial should be granted because, owing to the general nature of the averments of the amended complaint, the defendant could not anticipate the claim that the foreman had given this direction to the plaintiff, and that therefore, to its great prejudice, it was taken by surprise at the trial. It must be conceded that in the light of the evidence the complaint is not free from criticism and is somewhat misleading; it should have more particularly advised the defendant of the precise claim which would be made. I am not satisfied that counsel for the plaintiff wilfully drew the

complaint in such a manner as to withhold information touching this claim. The plaintiff is a foreigner, and it was very difficult to understand him when he was upon the witness stand, and it is entirely possible that the precise nature of what occurred was not known to his counsel until he testified. I do not think that there is a variance between the allegations and proofs, for the negligence alleged and relied upon by the plaintiff is the failure of the defendant to provide a safe place in which the plaintiff was required to work. It is true that in the course of the trial it appeared from one aspect of the testimony that the defendant had relieved itself of this obligation, and that the plaintiff himself had assumed it, but, as I have held, from another aspect of the testimony it appears that by reason of the directions of the foreman to the plaintiff, he, the plaintiff, was temporarily relieved from such obligation, and that the defendant thus resumed full responsibility in the premises, and that the accident occurred as a result of its failure to discharge its obligation thus temporarily resumed, so that after all the charge in the complaint that the defendant failed to provide a safe place to work is sustained by the proof. As I have already stated, the complaint is subject to criticism in being inaccurate and in not being sufficiently definite, but the defendant made no claim at the trial that it would suffer any serious prejudice if the trial was permitted to proceed, and even now, though arguing that it was taken by surprise, and that it could present a much better record upon another trial, no showing has been

made of the respects in which additional testimony could be adduced. Apparently all persons who had any knowledge of what occurred were present and testified, and no showing is now offered touching any additional specific evidence. I do not think that under the circumstances I would be justified in granting a new trial upon this ground alone.

Finally it is contended that the verdict is excessive, and I am inclined to concur in this view. Such was the very strong impression I had at the time it was returned, and I have not been able to escape the conviction that it ought to be set aside, if it is not diminished. The rules under which such action is taken, and the conditions justifying it, are well understood, and need not be discussed. I have therefore concluded to direct that unless the plaintiff is willing to remit $2500.00 of the verdict, and let it stand for $5000.00, a new trial will be granted. A written statement remitting the $2500.00 should be filed with the clerk within ten days from the date hereof; otherwise an order will be entered granting a new trial.

Filed April 26, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

STIPULATION

In conformity to the decision of the Honorable Frank S. Dietrich, Judge of the above entitled court rendered on, to-wit: the 26th day of April, A. D. 1917, wherein it was ordered that a new trial be granted in this action unless the plaintiff within ten

days from the said 26th day of April, A. D. 1917, file with the clerk, and serve upon the defendant, a stipulation consenting to remit Twenty-five Hundred Dollars ($2500) and accept Five Thousand Dollars ($5000) with interest and costs in full satisfaction of the judgment in said action, the undersigned, Louis Anderson, plaintiff in the above entitled action, and R. E. McFarland and W. B. McFarland, co-partners doing business under the firm name of McFarland & McFarlend, attorneys for the plaintiff in said action, hereby jointly and severally stipulate, agree and consent to remit the sum of Twenty-five Hundred Dollars ($2500) of the said judgment, and to accept the sum of Five Thousand Dollars ($5000) with interest and costs in full satisfaction of said judgment.

Dated this 27th day of April, 1917.

LOUIS ANDERSON,

Plaintiff.

McFARLAND & McFARLAND,

By R. E. McFARLAND,

Attorneys for Plaintiff.

W. B. McFARLAND,

Member of Firm.

State of Idaho,
County of Shoshone,—ss.

On this 27th day of April, in the year 1917, personally appeared before me, L. E. Worstell, a notary public in and for Shoshone County, State of Idaho, Louis Anderson and R. E. McFarland, personally known to me to be the persons who executed the fore-

going instrument, and they and each of them acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in Wallace, Idaho, the day and year in this certificate first above written.

L. E. WORSTELL,
Notary Public in and for the State of Idaho,
(Seal.) Residing at Wallace, Idaho.

My commission expires on the 19th day of June, 1919.

United States of America,
State of Idaho,
County of Kootenai,—ss.

R. E. McFarland, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff named in the above entitled action; that Featherstone & Fox are the attorneys of record for the defendant in said action, and reside and have their office at Wallace, Shoshone County, State of Idaho; That affiant served the above and foregoing stipulation upon the above named defendant, Federal Mining and Smelting Company, a corporation, on the 28th day of April, A. D. 1917, by depositing in the United States Post Office at Coeur d'Alene, Idaho, an envelope addressed to said Featherstone & Fox, at Wallace, Idaho, containing a true and correct copy of said stipulation, and prepaying the postage thereon.

That at said time there was and yet is a United States Post Office in said city of Wallace, Idaho, and in said city of Coeur d'Alene, Idaho, and that be-

tween said two places there was and yet is daily communication by mail.

R. E. McFARLAND,

Subscribed and sworn to before me this 28th day of April, A. D. 1917.

W. D. McREYNOLDS,
(Seal.) *Clerk of U. S. District Court.*
By L. M. LARSON,
Deputy Clerk.

Filed April 28, 1917, at 1:30 o'clock, P. M.
W. D. McReynolds, Clerk.
By Lawrence M. Larson, Deputy.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR

Comes now Federal Mining & Smelting Company, a corporation, defendant herein, and says that on or about the 24th day of November, A. D. 1916, this Court entered judgment herein in favor of the plaintiff and against the defendant in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenti-

cated may be sent to the said Circuit Court of Appeals.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Residence and postoffice address: Wallace, Idaho.
Filed May 3, 1917.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR

I.

The Court erred in overruling the defendant's demurrer to plaintiff's amended complaint.

II.

The Court erred in denying defendant's motion for non-suit made at the close of plaintiff's evidence in the case because the evidence adduced by the plaintiff was insufficient in the following particulars:

(a) The evidence did not show any negligence on the part of the defendant which was the proximate cause of the injuries sustained by the plaintiff.

(b) If the plaintiff in this case sustained the injuries complained of, the evidence shows he sustained them by reason of his own negligence and carelessness and his contributory negligence and carelessness.

(c) If the plaintiff was injured as alleged, the evidence shows he was injured by reason and through the risk of his employment, to-wit, the falling of rocks which was an obvious risk of his employment,

and which was assumed by the plaintiff upon his entering said employment.

(d) If the plaintiff was injured as alleged, the evidence shows that he was injured by reason of the negligent act of a fellow servant, to-wit, the shift boss in giving a wrongful and negligent direction and assurance in reference to a detail of the work.

Which motion was denied by the Court, to which ruling of the Court the defendant by counsel then and there duly excepted, which exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

III.

The Court erred in refusing to instruct and direct the jury to bring a verdict for the defendant for the following reasons, to-wit:

1. That the plaintiff has wholly failed to show any negligent act or omission on the part of the defendant which was the proximate or any cause of the accident or injury complained of in plaintiff's complaint.

2. That if the plaintiff was injured while in the employ of the defendant, as alleged in his complaint, he was injured by and through the negligence and carelessness of a fellow servant.

3. If the plaintiff was injured as complained of in his complaint, he was injured by and through his own negligence and carelessness, and his own contributory negligence and carelessness.

4. If he was injured as alleged in his complaint, he was injured by and through a risk of his employ-

ment which was plain and obvious to the plaintiff, and which risk was assumed by the plaintiff.

5. It is not alleged in the complaint, and the defendant was not advised, that the plaintiff would claim in this case that he was injured by and through an erroneous and careless and negligent direction of the shift boss.

To which ruling of the Court the defendant then and there by counsel duly excepted, which exception was allowed by the Court, and which ruling of the Court the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AND JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injuries to the plaintiff. The evidence is insufficient to show that the direction and assurance alleged to have been given the plaintiff by the shift boss was actually given by the shift boss to the plaintiff, and the evidence is insufficient to show that the language alleged to have been used by the shift boss was an order to the plaintiff to cease inspection and to stop barring down and a direction to proceed to work and an assurance of safety to either or any of them.

(b) The evidence conclusively shows that the proximate cause of plaintiff's injuries was the negligence of a fellow servant, to-wit, the shift boss. In this respect the evidence not only does not show that the shift boss was authorized by the defendant either by the written rules and regulations adopted and promulgated by the defendant or by the customs existing in defendant's mine to give such alleged assurance and direction under the then circumstances, but conclusively shows that the shift boss was not empowered or authorized by the defendant to give such alleged assurance and direction, and conclusively shows that the alleged assurance and direction of the said shift boss to the plaintiff was a violation of the duty which the said shift boss owed not only to the plaintiff but to the defendant as well, the violation of which duty on the part of the said shift boss could not have been foreseen or guarded against by the defendant, and which could not consequently be charged as negligence of the defendant.

The evidence further conclusively shows that the alleged assurance and direction of the shift boss, if the same actually were given, were a direction and assurance given by the shift boss to the plaintiff in reference to an executive detail of the work over which the plaintiff had exclusive control under the rules and regulations and customs of the defendant's mine. The evidence further conclusively shows that the shift boss was not a superintendent or head of a department but simply in charge of a number of men in defendant's mine and that the men of whom

the said shift boss was in charge, including the plaintiff, were with the shift boss engaged in the common object and employment and work of mining ore, and the plaintiff and the other miners on his shift were therefore fellow servants of the said shift boss.

(c) The evidence conclusively shows that despite the alleged assurance of safety and direction to proceed to work, the danger to which the plaintiff was exposed was so obvious that he assumed the risk thereof, it conclusively appearing from the evidence that the plaintiff was a miner of some sixteen years' experience, had worked in the employ of the defendant as a miner for more than a year and in the particular stope in which he was injured for more than a month, and in the particular place in which he was injured for more than three days; that under the rules, regulations and customs of the defendant's mine it was the duty of the plaintiff to examine and test the ground in or under which he was about to set to work to drill before commencing such drilling operations, and to bar down or remove any loose or dangerous rocks before commencing such drilling operations; and the evidence further conclusively shows that the plaintiff not only was perfectly competent and able to perform such duty but that he had the means and instrumentalities with which to do it and could, but for the said alleged assurance and direction of the shift boss have rendered the place in which he was working safe. The evidence further conclusively shows that the plaintiff had the greater and better opportunity than the shift boss

to determine whether of not the ground was reasoably safe and whether or not the same should be barred down or otherwise removed; and further conclusively shows that under the then existing condition under the rules, regulations and customs of the said mine he had no right to rely upon the alleged assurance of safety and direction to proceed to work.

(d) The evidence conclusively shows that the negligence of the plaintiff contributed to his own injuries in this that he set to work under ground which he knew it was his duty to inspect and examine without having made the necessary examination to determine whether the ground was safe or not to work under and without having adequately secured the same by barring down or other methods known to miners, he having had the opportunity and the ability to make such inspection and to adequately guard against the very danger which caused his injury.

(e) The evidence conclusively shows that the alleged assurance and direction of the shift boss, if given, were contradictory of and given in violation of the written rules and regulations adopted by the defendant.

(f) The verdict and judgment are excessive and not warranted by the evidence, it conclusively appearing from the testimony that the plaintiff is not incapacitated from the performance of manual or other labor, or incapacitated at all.

Comes now the defendant Federal Mining & Smelting Company in this action in connection with its petition for a writ of error, and makes, proposes

and files the foregoing assignments of error which it avers occurred upon the trial of said cause, together with its specifications where in the evidence is insufficient to sustain the verdict and judgment thereon, and prays that because thereof the judgment of the District Court may be reversed.

FEATHERSTONE & FOX,
Attorneys for Defendant.
Postoffice address, Wallace, Idaho.

Filed May 3, 1917.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON WRIT OF ERROR

Know All Men by These Presents, That we, Federal Mining & Smelting Company, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, having complied with all of the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, Louis Anderson, in the full and just sum of eleven thousand dollars ($11,000.00) to be paid to the said defendant in error, Louis Anderson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents;

Sealed with our seals and dated this 1st day of May, A. D. 1917.

Whereas, lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in this court between Louis Anderson as plaintiff and Federal Mining & Smelting Company, a corporation, as defendant, a judgment was rendered against the said Federal Mining & Smelting Company, upon the verdict of a jury in the sum of seven thousand five hundred dollars ($7,500.00) and costs amounting to the further sum of sixty-five dollars and twenty cents ($65.20); and,

Whereas, thereafter upon petition for a new trial presented by defendant to the said District Court of the United States for the District of Idaho, Northern Division, the said court made an order granting the said motion and setting aside the verdict of the jury and the said judgment thereon unless within ten days after making and filing of said order the plaintiff remit the sum of two thousand five hundred dollars ($2,500.00) and interest thereon from the said judgment; and

Whereas, pursuant to the said order and in conformity therewith, the plaintiff did in writing within said time remit the said sum of two thousand five hundred dollars and interest of the said judgment and thereupon judgment was entered in said action in favor of the said plaintiff and against the said defendant for the sum of five thousand dollars ($5,000.00) and costs amounting to the said sum of sixty-five dollars and twenty cents ($65.20); and

Whereas, the said defendant Federal Mining &

Smelting Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said plaintiff, Louis Anderson, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in the State of California.

Now, the condition of the above obligation is such that if the Federal Mining & Smelting Company shall prosecute the said writ of error to effect and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as bonds for costs upon appeal and is a supersedeas bond.

FEDERAL MINING & SMELTING COMPANY,
By Frederick Burbidge, Its General Manager and Agent, *Principal.*
THE AETNA ACCIDENT AND LIABILITY COMPANY,
By Herman J. Rossi, Resident Vice-President.
(Seal.)
Attest: R. Myers, Resident Assistant Secretary.

State of Idaho,
County of Shoshone,—ss.

On this 1st day of May, in the year 1917, before me, a Notary Public, personally appeared Herman J. Rossi and R. Myers, known to me to be the Resi-

dent Vice-President and Resident Assistant Secretary, respectively, of The Aetna Accident and Liability Company, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Idaho to transact a surety business in the State of Idaho and is authorized by the laws of the State of Idaho to become sole surety upon bonds.

R. S. CLOUGH,

(Seal.) *Notary Public.*

My commission expires Sept. 20, 1919.

The foregoing bond is hereby approved this 3rd day of May, A. D. 1917, and the same when filed shall operate both as a bond for costs on appeal and as a supersedeas bond.

Dated this 3rd day of May, A. D. 1917.

FRANK S. DIETRICH,

District Judge.

Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING WRIT OF ERROR

This 3rd day of May, A. D. 1917, came the defendant Federal Mining & Smelting Company by

its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration hereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of eleven thousand dollars ($11,000.00) which shall operate as a supersedeas bond.

Dated this 3rd day of May, A. D. 1917.

FRANK S. DIETRICH,
Judge of the United States District Court for the District of Idaho.

Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT

To W. D. McReynolds, Clerk of the United States District Court, Boise, Idaho:

You will please prepare a transcript in the above entitled cause and include therein:

1. Bond on writ of error, Petition for writ of error, Assignments of error, Order allowing writ

of error, Order to transmit original exhibits, Bond on writ of error, Praecipe for transcript, writ of error, Citation on writ of error and writ thereof, and all other papers relating to the writ of error.

2. Judgment roll.
3. Bill of exceptions.
4. Copy of all journal entries.
5. Everything else in the record.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Filed May 3, 1917.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER TO TRANSMIT ORIGINAL EXHIBITS

It appearing that a writ of error has been prayed for and allowed from the United States Circuit Court of appeals to the above entitled Court in this cause and good cause appearing therefore,

It Is Hereby Ordered that all of the original exhibits in the above entitled cause be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit. Said exhibits consist of the printed mining rules and regulations of the defendant Federal Mining & Smelting Company.

Dated this 3rd day of May, A. D. 1917.

FRANK S. DIETRICH,
District Judge.

Filed May 3, 1917.
W. D. McReynolds, Clerk.

WRIT OF ERROR

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States, for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Louis Anderson, plaintiff, and Federal Mining & Smelting Company, a corporation, defendant, a manifest error hath happened to the great damage of the said Federal Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you will send the record and proceedings aforesaid with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 3rd Day of June next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what

of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 3rd day of May, A. D. 1917, and in the one hundred forty-first year of the Independence of the United States of America.

Allowed by FRANK S. DIETRICH,
United States District Judge.

Attest: W. D. McReynolds, Clerk of the United States District Court, for the District of Idaho.
Filed May 3, 1917.

W. D. McReynolds, Clerk.

CITATION ON WRIT OF ERROR

In the United States Circuit Court of Appeals for the Ninth Circuit

The United States of America,
Ninth Judicial District,—ss.
To Louis Anderson, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, in said Circuit on the 3rd day of June next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Federal Mining & Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not

be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank S. Dietrich, District Judge of the United States at Boise, Idaho, within said Circuit, this 3rd day of May, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-first.

FRANK S. DIETRICH,
United State District Judge.

I hereby this 5th day of May, A. D. 1917, accept personal service of this citation on behalf of Louis Anderson, defendant in error.

W. B. McFARLAND,
Attorney for Defendant in Error.

Filed May 5, 1917.

W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,
(Seal.) *Clerk.*

(Title of Court and Cause.)

No. 655.

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 230, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $280.00, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said court this 19th day of May, 1917.

W. D. McREYNOLDS,

(Seal.) *Clerk.*